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No.

In the Supreme Court of the United States

JACK WILLIAM TOCCO,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

I. WHETHER THE DECISION OF THE SIXTH CIRCUIT COURT OF APPEALS CONFLICTS WITH THE DECISIONS OF OTHER CIRCUITS.

II. WHETHER THE DECISION OF THE SIXTH CIRCUIT COURT OF APPEALS CREATES SENTENCING DISPARITY AMONG THE CIRCUITS.

III. WHETHER THE CIRCUIT COURTS SHOULD PERMIT DE NOVO RESENTENCING WHEN A SENTENCE IS REVERSED OR SHOULD APPLY THE LAW OF THE CASE TO RESENTENCING AND RESENTENCING APPEALS.

PARTIES TO THE PROCEEDING

Pursuant to Rule 14.1(b) of the Rules of this Court, petitioner hereby provides the following names of the parties to this proceeding whose names do not appear on the caption:

Anthony Corrado, defendant;

Paul Corrado, defendant.

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Petitioner respectfully petitions for a Writ of Certiorari to review the judgment of the Sixth Circuit Court of Appeals in this case.

OPINIONS BELOW

The Sixth Circuit Opinion (App 2a) is reported at 306 F.3d 279 (6th Cir. 2002); the denial of rehearing (App 1a) is unreported. The District Court's resentencing decision (App 33a) is unreported. The first opinion of the Sixth Circuit in this case (App 93a) is reported at 200 F.3d 401, reh. den. 209 F.3d 935 (6th Cir. 2000). The District Court's first sentencing hearing (App 157a) is unreported.

JURISDICTION

Jurisdiction of this court is invoked pursuant to 28 U.S.C. §1254(1). The judgment of the Sixth Circuit was entered on September 6, 2002, and an order denying a timely motion for rehearing was entered on November 19, 2002 (App 1a). Jurisdiction in the Sixth Circuit was invoked pursuant to 18 U.S.C. §3742(b).

STATUTORY PROVISIONS INVOLVED

18 U.S.C. §3742(b) provides that "The Government may file a notice of appeal in the district court for review of an otherwise final sentence if the sentence (1) was imposed in violation of law; (2) was imposed as a result of an incorrect application of the sentencing guidelines ****"

18 U.S.C. §3742(f) provides that "If the court of appeals determines that the sentence— (1) was imposed in violation of law or imposed as a result of an incorrect application of the sentencing guidelines, the court shall

remand the case for further sentencing proceedings with such instructions as the court considers appropriate ****"

28 U.S.C. §2106 provides that "The Supreme Court or any other court of appellate jurisdiction may affirm, modify, vacate, set aside or reverse any judgment, decree, or order of a court lawfully brought before it for review, and may remand the cause and direct the entry of such appropriate judgment, decree, or order, or require such further proceedings to be had as may be just under the circumstances."

STATEMENT OF THE CASE

This case presents a recurring issue on which the circuit courts are divided: Whether reversal of a sentence in a federal criminal case permits de novo resentencing. Six circuit courts bar de novo resentencing, while six permit it. Eight circuit courts apply the law of the case to bar new issues in a second appeal, while four permit new issues to be considered. The Sixth Circuit is one of the six circuits that permit de novo resentencing and one of the four circuits that permit new issues in the second appeal.

On April 29, 1998, a jury in the Eastern District of Michigan convicted the petitioner, Jack W. Tocco (Tocco) of three federal law violations, Count One, a conspiracy to participate in a criminal enterprise, charged in the indictment as the Detroit La Cosa Nostra, through a pattern of racketeering (RICO[1] conspiracy, 18 U.S.C. §1962 (c) & (d)), Count Two, a conspiracy to participate in the same criminal enterprise through the collection of an unlawful debt (RICO conspiracy, 18 U.S.C. §1962(c) & (d)), and Count Six, a

[1] Racketeer Influenced and Corrupt Organization.

conspiracy to interfere with commerce by extortion (Hobbs Act conspiracy, 18 U.S.C. §1951). (Verdict, T. 4/29/98, p. 16-17) The jury acquitted Tocco on two counts of attempted interference with commerce by extortion and eight counts of interference with commerce by extortion. (Id.)

The district court held sentencing hearings on the parties' objections to the presentence report in November of 1998, and on November 13, 1998, sentenced Tocco to twelve months and one day in the custody of the Bureau of Prisons, with two years of supervised release and a fine. At sentencing, the district judge overruled the parties' objections to the computation of Tocco's sentencing guidelines in the presentence report, granted Tocco's motion for downward departure, and denied the government's motion for an upward departure. (Sentence, T. 11/13/98, p. 18-36, App. E 157a-171a)

Tocco appealed his conviction to the Sixth Circuit, and the government appealed Tocco's sentence pursuant to 18 U.S.C. § 3742(b). The government argued that the judge abused his discretion in departing downward, that Tocco should have been held responsible for the extortion offense in Count One (and enhancements applicable to the extortion offense), and that Tocco's offense level should have been increased for his role in the offense. On January 5, 2000, the Sixth Circuit affirmed Tocco's conviction but remanded for resentencing "not inconsistent with this opinion." *United States v. Tocco*, 200 F.3d 401, 436, reh. den. 209 F. 3d 935 (6th Cir. 2000), *(Tocco I)* (App. D, 155a).

The circuit court held that the denial of the government's request to increase Tocco's offense level for his role in the offense was error, and directed the district court on remand to apply a three-level enhancement for Tocco's role

in the offense. The Sixth Circuit ordered the district court on remand to reconsider its application of the guidelines to Tocco's offense level in Count One to determine whether the extortion guideline, and the extortion enhancements sought by the government, were applicable to Tocco in Count One. The district court was also directed on remand to make more specific findings supporting downward departure. *Tocco I*, p. 428-435 (App. D 143a-155a).

After remand, the district court held additional hearings in March of 2000, permitted the parties to present new evidence and file new objections, and resentenced Tocco on May 25, 2000. The district court reduced its downward departure from ten levels to four levels, applied the three-level enhancement for role in the offense, reaffirmed its finding that the Versaci Interstate Gambling Business was an act of racketeering attributable to Tocco in Count One, found for the first time that an Interstate Travel in Aid of Racketeering offense involving the Frontier Hotel in Nevada was also a racketeering act attributable to Tocco in Count One, and reaffirmed that the Hobbs Act extortion conspiracy was not an act of racketeering attributable to Tocco in Count One. (District Court Opinion, App C 33a) The district court did not apply the enhancements to Tocco's base offense level for threats, possession of a weapon, and amount of loss. In all other respects, the district judge's sentencing findings were identical with his findings at the first sentence. Tocco was sentenced to a term of thirty-four months custody, two years of supervised release, and a fine.

The government appealed the district judge's resentencing of Tocco, raising many errors in the application of the sentencing guidelines that were not raised in the first appeal. In the second appeal, the government did not ask the

Sixth Circuit to reverse the district court's four-level downward departure at resentencing.

The petitioner argued to the Sixth Circuit that sentencing errors claimed by the government in the second appeal, which could have been claimed in the first appeal, but were not, were waived for the purposes of the second appeal. The appeal was assigned to a different panel of the court.

On September 6, 2002, the Sixth Circuit again reversed Tocco's sentence, and remanded for resentencing. *United States v. Tocco*, 306 F.3d 279 (6th Cir. 2002) *(Tocco II)* (App B 2a). The Sixth Circuit held that the district court committed clear error when it failed to find that the extortion conspiracy was an act of racketeering attributable to Tocco in Count One, and that at least one of the individual, substantive extortion offenses of which the defendant was acquitted also should be counted as a racketeering offense in Count One.

The second panel noted that the first panel had stated in dicta that the government was claiming that other acts of racketeering were attributable to Tocco in Count One, not just the Hobbs Act conspiracy, and that this dicta gave the second panel authority to address these claims. *Tocco II,* p. 294 (App. B 30a). The second panel held that the district court erred when it did not hold Tocco responsible in Count One for the racketeering activity of the Interstate Travel in Aid of Racketeering Offense involving the Edgewater Hotel in Nevada, but that it did not err when it held Tocco was not responsible for the conspiracy to murder Harry Bowman.

The second panel also ordered the district court at Tocco's third sentencing to enhance Tocco's base offense level in the Versaci gambling offense by four levels for his role in the offense, and to enhance Tocco's base offense level

for any extortion by three levels for a leadership role. The Sixth Circuit also directed the district court, on remand, to recalculate the base offense level for Tocco in Count Six.

A motion for rehearing was denied on November 19, 2002.

REASONS FOR GRANTING THE WRIT

I. THE DECISION OF THE SIXTH CIRCUIT COURT OF APPEALS CONFLICTS WITH THE DECISIONS OF OTHER CIRCUITS

The First, Third, Fourth, Fifth, Seventh, and District of Columbia Circuit Courts do not permit "de novo resentencing" in the district court if a sentence is reversed on appeal. These circuit courts also follow the "law of the case" doctrine, where a sentencing issue which could have been raised in the first appeal by the parties, but was not, is considered waived and may not be raised in the second appeal by the parties. Second sentencings in these circuits are limited to correcting the errors recognized by the circuit court, and second sentencing appeals are limited to reviewing the correction of those errors. See, *United States v. Ticchiarelli*, 171 F.3d 24, 32 (1st Cir.), cert. den., 528 U.S. 850 (1999); *United States v. Kikumura,* 947 F.2d 72 (3rd Cir. 1991); *United States v. Aramony,* 166 F.3d 655 (4th Cir.), cert. den. 526 U.S. 1146 (1999); *United States v. Marmolejo*, 139 F.3d 528 (5th Cir.), cert. den. 525 U.S. 1056 (1998), *United States v. Becerra*, 155 F. 3d 740, 757 (5th Cir. 1998), and *United States v. Hass,* 199 F.3d 749 (5th Cir. 1999), cert. den. 531 U.S. 812 (2000); *United States v. Parker,* 101 F.3d 527, 528 (7th Cir. 1996); *United States v. Whren*, 111 F. 3d 956, 960 (D.C. Cir. 1997), cert. den. 522 U.S. 1119

(1998) and *United States v. McCoy (en banc)*, 313 F.3d 561 (D.C. Cir. 2002).

Five of these six circuit courts—the Third, Fourth, Fifth, Seventh and District of Columbia Circuit—do not permit any new evidence to be introduced at resentencing. *See*, *United States v. Dickler*, 64 F.3d 818 (3rd Cir. 1995); *United States v. Parker*, 30 F.3d 542, 553-54 (4th Cir.), cert. den. 513 U.S. 1029 (1994); *United States v. Becerra; United States v. Wyss*, 147 F.3d 631 (7th Cir. 1998); *United States v. Whren* and *United States v. Leonzo*, 50 F.3d 1086 (D.C. Cir. 1995).

Two other circuit courts—the Second and Eighth Circuit—permit de novo resentencing in the district court after a sentence is reversed, but consider any issues which could have been raised in the first sentencing appeal, but were not, waived for the purposes of resentencing. *Compare, United States v. Atehortva*, 69 F.3d 679 (2nd Cir. 1995), cert. den. sub nom. *Correa v. United States*, 517 U.S. 1249 (1996), permitting resentencing de novo, *with, United States v. Minicone*, 26 F.3d 297 (2nd Cir.), cert. den. 513 U.S. 940 (1994) and *United States v. Stanley*, 54 F.3d 103 (2nd Cir.), cert. den. 516 U.S. 891 (1995), both holding that parties were prohibited from presenting new issues on the second appeal that were not pursued in the first appeal. And, *compare, United States v. Cornelius*, 968 F.2d 703 (8th Cir. 1992) and *United States v. Kang*, 197 F.3d 927 (8th Cir. 1999), both permitting de novo resentencing, *with, United States v. Bartsch*, 69 F.3d 864, 866 (8th Cir.1995) and *United States v. Behler*, 100 F.3d 632 (8th Cir. 1996), cert. den. 522 U.S. 855 (1997) both holding that the district court was prohibited at resentencing from reconsidering issues decided in the first sentencing appeal.

The Sixth Circuit applies a different rule when it reverses a sentence. The Sixth Circuit permits de novo resentencing, and does not apply the law of the case to resentencings. Second sentencings in the Sixth Circuit are not limited to correcting the errors recognized by the circuit court in the first appeal, and second sentencing appeals are not limited to reviewing the correction of errors recognized in the first appeal. *See, United States v. Duso,* 42 F.3d 365 (6th Cir. 1994), *United States v. Hebeka*, 89 F.3d 279, 284 (6th Cir.), cert. den. 519 U.S. 999 (1996), and *United States v. Jennings*, 83 F.3d 145, 151 (6th Cir.), cert. den. 519 U.S. 975 (1996); *United States v. Rudolph,* 190 F.3d 720 (6th Cir. 1999). The Sixth Circuit has explicitly held that the law of the case "has little applicability" to resentencing proceedings or second sentencing appeals, and "does not directly apply to resentencing." *United States v. Hebeka; United States v. Crouse,* 145 F.3d 786, 788 (6th Cir. 1998). However, the second panel of the Sixth Circuit applied the law of the case to compel one sentencing decision in this case, and has applied the law of the case to bar issues in a second appeal in civil cases, *see, e.g., Crick v. Smith*, 729 F.2d 1038 (6th Cir.), cert. den. 469 U.S. 838 (1984).

The only time the Sixth Circuit has shown a willingness to limit a district court in its reconsideration of a defendant's sentence is if the panel placed a limit on the district court by its remand instructions. *See, United States v. Duso, United States v. Jennings, United States v. Moore*, 131 F.3d 595 (6th Cir. 1997), *United States v. Thomas*, 167 F.3d 299 (6th Cir. 1998), *United States v. Campbell,* 168 F.3d 263 (6th Cir.), cert. den. 528 U.S. 882 (1999), and *United States v. Reed,* 264 F.3d 640 (6th Cir. 2001), cert. den. 535 U.S. 962 (2002). Other circuit courts also recognize the limits of a remand order in a sentencing reversal. *See, e.g., United States v. Apple,* 962 F.2d 335 (4th Cir. 1992);

United States v. Bell, 5 F.3d 64 (4th Cir. 1993); *United States v. Polland,* 56 F.3d 776 (7th Cir. 1995); *United States v. Quintieri,* 306 F.3d 1217 (2nd Cir. 2002).

Only three other circuit courts—the Ninth, Tenth, and Eleventh Circuit—follow the Sixth Circuit rule of de novo resentencing and do not apply the law of the case to resentencings. *See, United States v. Ponce,* 51 F.3d 820 (9th Cir. 1994), *United States v. Cuddy,* 147 F.3d 1111 (9th Cir. 1998), and *United States v. Matthews,* 278 F.3d 880 (9th Cir.), cert. den. ___U.S.___, 122 S.Ct. 2345 (2002); *United States v. Smith,* 930 F.2d 1450 (10th Cir.), cert. den. 502 U.S. 879 (1991) and *United States v. Keifer,* 198 F.3d 798 (10th Cir. 1999); *United States v. Stinson,* 97 F.3d 466 (11th Cir. 1996), cert. den. 519 U.S. 1137 (1997).

This widespread split of the circuits is more of a splinter: six circuits do not permit de novo resentencing and limit second appeals by applying the law of the case, five of those circuits prohibit new evidence at resentencing, two other circuits permit de novo resentencing but limit second appeals by the law of the case, and four circuits permit de novo resentencing and do not limit issues in the second appeal, except by terms of its remand.

This widespread split of opinion in the circuit courts regarding the scope of resentencing proceedings and appeals has been recognized in several circuit court opinions. *See, e.g., United States v. Ticchiarelli; United States v. Marmolejo; United States v. McCoy,* 280 F.3d 1058, 1062-1063 (D.C. Cir. 2002), *vacated by United States v. McCoy (en banc).*

This widespread, recurring split of opinion should be reviewed by this court.

II. THE DECISION OF THE SIXTH CIRCUIT CREATES SENTENCING DISPARITY AMOUNG THE CIRCUITS

The right to appeal all sentences was created by P.L. 98-473 and was part of the Sentencing Reform Act and the Comprehensive Crime Control Act of 1984, the act that also created the Sentencing Commission and led to the formulation of the Sentencing Guidelines. With the advent of sentencing guidelines and sentencing appeals in federal cases, resentencings, and second sentencing appeals, have become recurring events in federal jurisprudence.

The primary purpose of the Sentencing Reform Act was to end "the shameful disparity in criminal sentences* * * *" *See, Senate Report 98-225,* p. 65 (1984). When, as here, the Circuit Courts apply different rules to resentencing and sentencing appeals, a new sentencing disparity has been created.

If the petitioner's sentence had been reversed in one of the six circuits that do not permit de novo resentencing, the district court on remand would have been restricted to reconsider only the Guidelines issues presented to the first panel. If the remand were to one of the five circuits where no new evidence is permitted at resentencing, both the government and the defendant would not have been able to present new evidence to enhance or reduce Tocco's sentence.

If the second appeal from Tocco's resentencing had occurred in one of the eight circuits that apply the law of the case to resentencing appeals, the appeals court could have reviewed in the second appeal the district court's downward departure and the district court's finding whether the extortion

conspiracy was attributable to Tocco as a racketeering act in Count One.

Since Tocco's sentence was reversed in the Sixth Circuit, a de novo resentencing circuit, the district court could, as it did, reconsider all Guidelines rulings within the scope of the remand, hear new evidence, and find Tocco responsible for another act of racketeering. The government could challenge in the second appeal, as it did, Guidelines rulings the district court reaffirmed at resentencing, even though those rulings could have been challenged in the first appeal, but were not. The Sixth Circuit could, as it did, correct errors of the district court not addressed by the first panel, and order a resentencing on a count of the indictment whose offense level was not challenged by the government in the first appeal.

Tocco has suffered prejudice from the application of the Sixth Circuit's de novo resentencing rules. Tocco will now face his third sentencing hearing in four years, and his base offense level will have to be increased a second time. Tocco has served a second sentence, been released from custody, and may have to face incarceration a third time, although committing no new offense.

III. THE CIRCUIT COURTS SHOULD NOT PERMIT DE NOVO RESENTENCING WHEN A SENTENCE IS REVERSED AND SHOULD APPLY THE LAW OF THE CASE TO RESENTENCING AND RESENTENCING APPEALS

The rule of the majority of the circuits not permitting de novo resentencing and applying the law of the case to prohibit new issues from being raised in the second sentencing

appeal is the better rule and should have been applied by the Sixth Circuit. As explained by *United States v. Bell*, 988 F.2d 247, 250 (1st Cir. 1993), as quoted in *United States v. Ticchiarelli,* 171 F.3d at 28-29:

> [A] legal decision made at one stage of a civil or criminal case, unchallenged in a subsequent appeal despite the existence of ample opportunity to do so, becomes the law of the case for future stages of the same litigation, and the aggrieved party is deemed to have forfeited any right to challenge that particular decision at a subsequent date. Abandoning this prudential principle would threaten the important policy considerations underlying the law of the case doctrine, such as stability in the decision making process, predictability of results, proper working relationships between trial and appellate courts, and judicial economy.

The reason for the rule was stated more succinctly by Judge Posner in the Seventh Circuit in *United States v. Parker*: "A party cannot use the accident of a remand to raise in a second appeal an issue that he could just as well have raised in the first appeal ***." The District of Columbia Circuit has also criticized de novo resentencing in *United States v. Whren:*

> De novo resentencing is in essence a license for the parties to introduce issues, arguments, and evidence that they should have introduced at the original sentencing hearing.

De novo resentencing flies in the face of Fed. Rule of Crim. Pro. 32, which requires objections to sentencing errors to be made in the trial court, and Rule 52, which requires that errors that have not been brought to the attention of the court may be noticed only if they affect substantial rights.

Those circuits that prohibit de novo resentencing do permit the reopening of an issue at resentencing that has been made important by the decision in the first appeal. *See, e.g., United States v. McCoy (en banc).* If a reversal of a sentence "breathed life" in a previously dormant issue, it may be considered by the district court. *United States v. Ticchiarelli,* 171 F.3d at 32. The law of the case does not apply to sentencing, or any other proceeding, where there is a subsequent proceeding producing substantially different evidence, controlling authority has changed, or the prior decision was clearly erroneous and would work manifest injustice. *United States v. Aramony,* 166 F.3d at 661.

Permitting de novo resentencing can cause years of uncertainty produced by multiple, cyclical sentencing appeals. For another Sixth Circuit case that has produced three sentencing proceedings, *see, United States v. Reed.* For a Sixth Circuit case resulting in a fourth sentencing hearing, *see, United States v. Crouse.* In the Eighth Circuit, another de novo sentencing circuit, four sentencings have occurred in *United States v. Cornelius,* 999 F.2d 1293 (8th Cir. 1993).

De novo resentencing also permits panel shopping and appellate sentencing, which is not the object of sentencing appeals. "The sentencing provisions [of the Sentencing Reform Act of 1984] are designed to preserve the concept that the discretion of a sentencing judge has a proper place in sentencing and should not be displaced by the discretion of an appellate court." *Senate Report 98-225,* p. 150 (1984).

De novo resentencing is often justified because otherwise parties might raise every sentencing issue in the first appeal. *United States v. Jennings,* 83 F.3d at 151. This is a specious reason to permit de novo resentencing, since the circuits which do not permit de novo resentencing allow the reopening of issues if there is an exception to the law of the case, or if the appeal "breathes life" into an issue which was dormant at the first sentencing.

Since the statue authorizing the right to appeal a sentence in all federal offenses, 18 U.S.C. §3742, was enacted by Congress in 1984, the Supreme Court has not addressed whether resentencing is de novo or whether the law of the case applies to the sentencing process. The law-of-the-case doctrine was held to be properly applied to bar relitigation of issues in a death penalty case in *Barclay v. Florida,* 463 U.S. 939 (1983) and has been recognized as a rule of practice that "promotes the finality and efficiency of the judicial process by 'protecting against the agitation of settled issues.' [citation omitted]" in *Christianson v. Colt Industries Operating Corp,* 486 U.S. 800, 815-816 (1988).

Although the Double Jeopardy Clause[2] does not bar government appeals of sentences in criminal cases, *United States v. DiFrancesco,* 449 U.S. 117 (1980), considerations of finality of sentence, judicial economy, and disparity of sentencing practices suggest that resentencing should not be de novo, that second sentencing appeals should be restricted by the law of the case, and that these issues must be settled by this court.

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[2] "[N]or shall any person be subject for the same offense to be twice put in jeopardy of life or limb." Amendment V, U.S. Const.

CONCLUSION

For the reasons set forth above, the Petition for Writ of Certiorari should be granted.

Respectfully Submitted,

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APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

Case Nos. 00-1727, 00-1757

[Filed November 19, 2002]

UNITED STATES OF AMERICA,	)
Plaintiff - Appellant Cross-Appellee	)
v.	)
JACK WILLIAM TOCCO,	)
Defendant - Appellee Cross-Appellant	)
	)

BEFORE: DAUGHTREY and MOORE, Circuit Judges; ECONOMUS, District Judge*

ORDER

Upon consideration of the petition for rehearing filed by the appellee cross - appellant,

It is **ORDERED** that the petition for rehearing be, and it hereby is, **DENIED**.

ENTERED BY ORDER OF THE COURT
/s/ _____
Leonard Green, Clerk

* The Hon. Peter C. Economus, U.S. District Judge for the Northern District of Ohio, sitting by designation.

APPENDIX B

UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

Case Nos. 00-1727, 00-1757

[Filed September 6, 2002]

UNITED STATES OF AMERICA, Plaintiff - Appellant Cross-Appellee	)
v.	)
JACK WILLIAM TOCCO, Defendant - Appellee Cross-Appellant	)

Appeal from the United States District Court
for the Eastern District of Michigan at Detroit
No. 96-80201
John Corbett O'Meara, District Judge

BEFORE: DAUGHTREY and MOORE, Circuit Judges; ECONOMUS, District Judge*

* The Hon. Peter C. Economus, U.S. District Judge for the Northern District of Ohio, sitting by designation.

OPINION

KAREN NELSON MOORE, Circuit Judge. In 1998, Jack William Tocco was convicted of two counts of conspiracy in violation of the Racketeer Influenced and Corrupt Organizations Act, 18 U.S.C. § 1962(d), and one count of conspiracy in violation of the Hobbs Act, 18 U.S.C. § 1951, and he was sentenced to twelve months and a day of imprisonment. This court heard Tocco's appeal regarding his conviction and the government's appeal regarding Tocco's sentence in 1999, and we affirmed Tocco's conviction but vacated his sentence and remanded for resentencing. In May, 2000, the district court resentenced Tocco to thirty-four months' imprisonment. The government now appeals this sentence, and Tocco cross-appeals. For the following reasons, we again **VACATE** Tocco's sentence and **REMAND** to the district court for proceedings consistent with this opinion.

I. BACKGROUND

The facts of this case leading up to the first appeal are set out this court's first opinion, *United States v. Tocco*, 200 F.3d 401, 410-11 (6th Cir. 2000). In brief, on March 14, 1996, Jack William Tocco ("Tocco") was indicted, along with sixteen other individuals, on twenty-five counts involving the allegedly illegal activities of the "Detroit Cosa Nostra Family."[1] According to the indictment, Tocco was the "Boss"

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[1] Tocco was tried with five co-defendants: Anthony J. Tocco, Anthony J. Corrado, Anthony J. Zerilli, Nove Tocco, and Paul Corrado. *See United States v. [Paul] Corrado*, 227 F.3d 528 (6th Cir. 2000) ("*Corrado I*"); *United States v. [Anthony J.] Corrado*, 2000 U.S. App. LEXIS 23298, Nos. 98-2394 & 99-1001, 2000 WL

of the Family, and he was personally indicted on thirteen counts of conspiracy, extortion, and attempted extortion. On April 29, 1998, a jury in the United States District Court for the Eastern District of Michigan convicted Tocco of three counts: (1) conspiracy to engage in racketeering activity in violation of the Racketeer Influenced and Corrupt Organizations Act ("RICO"), 18 U.S.C. § 1962(d) (Count 1); (2) conspiracy to collect unlawful debt in violation of RICO, 18 U.S.C. § 1962(d) (Count 2); and (3) conspiracy to interfere with commerce by extortion in violation of the Hobbs Act, 18 U.S.C. § 1951 (Count 6).

Following Tocco's conviction, a probation officer prepared a lengthy presentence investigation report ("PSR") pursuant to the 1997 United States Sentencing Guidelines ("U.S.S.G."), recommending, in pertinent part, that Tocco be sentenced at a total offense level of 22 but also delineating "factors that may warrant departure." Joint Appendix ("J.A.") at 2354-56 (PSR). On November 13, 1998, the district court adopted the factual findings and guideline application of the presentence report[2]; the court concluded

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1290343 (6th Cir. Sept. 8, 2000) ("*Corrado II*"); *see also United States v. [Paul] Corrado*, 227 F.3d 543 (6th Cir. 2000) ("*Corrado III*"), *reh'g denied*, 286 F.3d 934 (6th Cir. 2002) ("*Corrado IV*") (regarding the government's forfeiture action against Paul Corrado, Jack Tocco, Vito W. Giacalone, Nove Tocco, and Anthony Corrado).

[2] Because the district court, like the PSR, relied on 1997 version of the United States Sentencing Guidelines in sentencing Tocco, all references to the Guidelines and the Commentary to the Guidelines in this opinion are to the 1997 version.

that Tocco's total offense level was 22, but the court departed downward 10 levels, explaining that "the sentence departs from the guideline range for the following reason(s): Extraordinary community service involvement by the defendant; the age and health condition of the defendant and the health condition of defendant's wife." J.A. at 1296. As the district court also concluded that Tocco's criminal history category was I, the court sentenced Tocco to twelve months and one day of imprisonment, two years of supervised release, and a fine of $ 75,000.[3] Tocco appealed the judgment of conviction against him, and the government appealed Tocco's sentence.[4]

This court heard the cross-appeals in Tocco's case on June 11, 1999, and on January 5, 2000, we issued an opinion affirming Tocco's conviction but vacating his sentence and

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[3] An amended judgment and sentence were entered on November 30, 1998. The only change was to the amount of the fine, which was increased to $ 94,447.32.

[4] Following Tocco's sentencing, the government sought forfeiture of his proceeds from the racketeering activity, pursuant to 18 U.S.C. § 1963(a). The district court denied the government's forfeiture request, finding that the government had failed sufficiently to track to Tocco the monies involved in the conspiracy. In September 2000, we reversed the district court, and we instructed the court on remand to assess a total of $ 1,234,700 in forfeiture against Tocco for his involvement in the Hobbs Act conspiracy and to determine an appropriate amount of forfeiture to assess against Tocco for his involvement in the Edgewater Hotel activities. *Corrado III*, 227 F.3d at 528.

remanding for resentencing. In regard to Tocco's sentence, we first noted that "we can recall no presentence report comparable to the one pertaining to Tocco in the instant case, containing what might well be construed as 'arguments' that Tocco was not involved in most of the criminal activity of which he was convicted." *Tocco*, 200 F.3d at 428. We then discussed the appropriate total offense level for Tocco, and we concluded that the district court had erred in assessing what conduct was relevant for the Count 1 RICO conspiracy base offense level because the court "made no findings whatsoever as to what criminal activities were in furtherance of the conspiracy and what activities were reasonably foreseeable by Tocco." *Id.* at 430. We also held that "the district court committed clear error in concluding that Tocco did not have a supervisory role in this case," and "instructed the district court on remand to apply the three-level enhancement . . . pursuant to U.S.S.G. § 3B1.1(b)" to Tocco's Count 6 Hobbs Act conspiracy offense level. *Id.* at 432. Finally, we addressed the district court's ten-level downward departure and stated that "based on our conclusion that the district court must revisit the sentence imposed under the guidelines, we further instruct the court to reconsider its decision to depart from the guideline range once that range has been redetermined." *Id.* Although we did not specify whether departures would be appropriate, we did discuss what factors the court would need to find in order to warrant any downward departure.

After evidentiary hearings in March, 2000, the district court on May 25, 2000, resentenced Tocco to thirty-four months' imprisonment, two years of supervised release, and a fine of $ 94,447.32. The district court determined that Tocco's total offense level was 24, and the court then

departed downward four levels for "extraordinary community service involvement by the defendant." J.A. at 212. The following day, the district court issued a memorandum explaining the sentence. On June 23, 2000, the government appealed Tocco's sentence, and on June 27, 2000, Tocco cross-appealed. The government and Tocco agree that Tocco's offense level for his Count 2 RICO conspiracy conviction should be 19. The government contends, however, that the district court erred in determining the offense levels for Tocco's Count 1 RICO conspiracy and Count 6 Hobbs Act conspiracy convictions. Tocco contends that the government should not have been able to argue for the inclusion of certain offenses and enhancements as relevant conduct for his Count 1 RICO conspiracy conviction at his resentencing hearing and that the district court erred in failing to depart downward from the sentencing range for Tocco's and his wife's health.

II. ANALYSIS

A. Standard of Review

This court reviews the district court's application of the United States Sentencing Guidelines de novo and the district court's findings of fact at sentencing for clear error. *See United States v. Canestraro*, 282 F.3d 427, 431 (6th Cir. 2002); *United States v. Vandeberg*, 201 F.3d 805, 811 n.2 (6th Cir. 2000) (applying this standard to enhancements imposed pursuant to U.S.S.G. § 3B1.1). A district court's finding that the criminal acts of others in a jointly undertaken criminal activity are reasonably foreseeable and in furtherance of the jointly undertaken criminal activity is reviewable for clear error. *See Canestraro*, 282 F.3d at 433; *United States v. Hamilton*, 263 F.3d 645, 654 (6th Cir. 2001). However, a

district court's conclusion that conduct constitutes relevant conduct is reviewable de novo. *See United States v. Hardin*, 248 F.3d 489, 492-93 (6th Cir. 2001). "A finding is 'clearly erroneous' when, although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed." *United States v. Charles*, 138 F.3d 257, 262 (6th Cir. 1998) (quotation omitted).

B. Count 1 -- RICO Conspiracy

This court stated in its first opinion that for Tocco's RICO conspiracy counts, "the appropriate offense level should be determined by reference to U.S.S.G. § 2E1.1, which provides that the base offense level for unlawful conduct related to racketeer influenced and corrupt organizations is either 19 or 'the offense level applicable to the underlying racketeering activity,' whichever is greater." *Tocco*, 200 F.3d at 428-29.[5] The district court concluded at resentencing, as it concluded at Tocco's original sentencing, that Tocco's base offense level for the Count 1 RICO conspiracy was 19. At resentencing, the district court arrived at this conclusion by finding that Tocco was responsible for only two underlying racketeering offenses: (1) interstate travel in aid of racketeering, in violation of 18 U.S.C. § 1952, for activities related to the Frontier Hotel and Casino ("Frontier

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[5] We note that in order to convict a defendant of a RICO conspiracy charge, a jury must find beyond a reasonable doubt that the defendant agreed to the commission of at least two underlying racketeering activities (or predicate acts). *See* 18 U.S.C. § 1961(5) ("'pattern of racketeering activity' requires at least two acts of racketeering activity").

Hotel activities"); and (2) involvement in an illegal gambling business, in violation of 18 U.S.C. § 1955, for activities related to a gambling operation owned and operated by Frank Versaci ("Versaci Gambling Operation"). The district court found that the Versaci Gambling Operation activities and the Frontier Hotel activities constituted relevant conduct pursuant to U.S.S.G. § 1B1.3(a)(1)(B). The offense level for the Frontier Hotel activity was 6, and the offense level for the Versaci Gambling Operation was 12. *See* U.S.S.G. § 2E1.2(a) & 2E3.1(a)(1)(A). Pursuant to U.S.S.G. § 3D1.4, therefore, the district court calculated Tocco's offense level for the applicable underlying racketeering activity at 13; as this is less than 19, the district court concluded that Tocco's base offense level for the Count 1 RICO conspiracy was 19.[6]

The government argues on this appeal, as it argued on the first appeal, that the district court erred by not including the following underlying racketeering offenses in its calculation of Tocco's base offense level for the Count 1 RICO conspiracy: (1) interstate travel in aid of racketeering, in violation of 18 U.S.C. § 1952, for activities related to the Edgewater Hotel and Casino ("Edgewater Hotel activities"); (2) conspiracy to murder Harry Bowman ("Bowman murder conspiracy"), in violation of 18 U.S.C. § 1117; (3) conspiracy to interfere with commerce by extortion and nine acts of extortion in violation of the Hobbs Act, 18 U.S.C. § 1951. In

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[6] In *Tocco*, we explained that after determining the offense levels applicable to a defendant's underlying racketeering activity pursuant to U.S.S.G. § 2E1.1(a)(2), a court should "make the appropriate adjustments under Parts A through D of Chapter Three of the guidelines." *Tocco*, 200 F.3d at 431 (quotation omitted); *see also* U.S.S.G. § 2E.1.1, commentary, applic. note 1.

addition, the government argues that the district court should have applied a four-level enhancement for aggravating role, pursuant to U.S.S.G. § 3B1.1(a), to its calculation of Tocco's offense level for the Versaci Gambling Operation.[7] We conclude that the district court did not clearly err in finding that the Bowman murder conspiracy did not constitute an underlying racketeering offense for the purpose of calculating Tocco's Count 1 RICO conspiracy offense level. The district court did err, however, in failing to apply a four-level aggravating role enhancement to its calculation of the offense level for the Versaci Gambling Operation and in concluding that the Edgewater Hotel activities, the Hobbs Act conspiracy, and the acts of extortion did not constitute underlying racketeering offenses for the purpose of calculating Tocco's Count 1 RICO offense level.

Racketeering activity constitutes "underlying racketeering activity" under U.S.S.G. § 2E1.1 for the purpose of calculating a defendant's base offense level for a RICO conviction if it constitutes relevant conduct as defined in U.S.S.G. § 1B1.3. *See Tocco*, 200 F.3d at 430 (holding that the relevant conduct rules apply to the determination of "underlying racketeering activity"). Relevant conduct includes, in pertinent part: (1) "all acts or omissions" that the defendant "committed, aided, abetted, counseled, commanded, induced, procured, or willfully caused"; and (2)

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[7] Had the district court included all of the above underlying racketeering offenses and their various enhancements as proposed by the government in its calculation of Tocco's base offense level for the Count 1 RICO conspiracy, Tocco's total offense level would have been 36.

"all reasonably foreseeable acts and omissions of others in furtherance of the jointly undertaken criminal activity," that occurred during, in preparation for, or in the course of attempting to avoid detection or responsibility for the RICO conspiracy. U.S.S.G. § 1B1.3(a)(1)(A) & (B). "The existence of relevant conduct is determined at sentencing by a preponderance of the evidence." *Corrado I*, 227 F.3d at 542.

We note that the Commentary to U.S.S.G. § 1B1.3(a)(1)(B) states that "because a count may be worded broadly and include the conduct of many participants over a period of time, the scope of the criminal activity jointly undertaken by the defendant ("the jointly undertaken criminal activity") is not necessarily the same as the scope of the entire conspiracy, and hence relevant conduct is not necessarily the same for every participant." U.S.S.G. § 1B1.3(a)(1), commentary, applic. note 2. The Commentary then further states that "in order to determine the defendant's accountability for the conduct of others under subsection (a)(1)(B), the court must first determine the scope of the criminal activity the particular defendants agreed to jointly undertake (i.e. the scope of the specific conduct and objectives embraced by the defendant's agreement)." U.S.S.G. § 1B1.3(a)(1), commentary, applic. note 2; *see also United States v. Campbell*, 279 F.3d 392, 399-400 (6th Cir. 2002).

1. Versaci Gambling Operation Enhancement

The district court found at resentencing that Tocco was not an "organizer, leader, manager, or supervisor" in the Versaci Gambling Operation, and, therefore, the court did not apply a four-level enhancement to the Versaci Gambling

Operation offense level pursuant to U.S.S.G. § 3B1.1(a). We conclude that the district court erred in not applying the enhancement.[8] In our first opinion in this case, we held in regard to Tocco's offense level for the Count 6 Hobbs Act conspiracy that "we find from a review of the record that the district court committed clear error in concluding that Tocco did not have a supervisory role in this case." *Tocco*, 200 F.3d at 432. We then explained that:

> The government's theory of the case was that Nove [Tocco] and [Paul] Corrado could not engage in their extortionate activities without the permission of Tocco. . . . The jury found Tocco guilty of conspiring to commit those extortionate activities in Count Six, indicating that they found Tocco to be the "boss" or "manager" or "supervisor."

Id. Therefore, we instructed the district court on remand to apply a three-level aggravating role enhancement to Tocco's offense level for the Count 6 Hobbs Act conspiracy.

We believe that the same rationale applies to the four-level aggravating role enhancement for the Versaci Gambling

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[8] We would normally review a district court's findings of fact at sentencing for clear error, and the court's legal conclusions regarding the application of the Sentencing Guidelines de novo. *See Vandeberg*, 201 F.3d at 811 n.2. However, "because the District Court failed to articulate the factual basis for the enhancement, we are compelled to conduct a de novo review of the record and determine whether the enhancement is applicable, or whether remand for further findings is required." *Id.*

Operation offense level. The government's theory of the gambling operation was that Tocco was the financial backer of the operation and that the other participants in the operation could not act without Tocco's permission. In fact, Tocco's *only* alleged participation in the Versaci Gambling Operation was as its organizer or leader. We recognize that because the jury verdict for the Count 1 RICO conspiracy was general, we do not know whether the jury found Tocco guilty of the conspiracy in regard to the Versaci Gambling Operation. *See United States v. Neuhausser*, 241 F.3d 460, 467 (6th Cir. 2001) ("in light of the jury's general verdict, it was not possible to say whether [the defendant] had been found guilty of conspiracy to distribute crack, marijuana, or both." (interpreting *United States v. Dale*, 178 F.3d 429, 431 (6th Cir. 1999)); *see also Corrado I*, 227 F.3d at 541 ("The jury's general verdict of guilty as to the RICO conspiracy count did not indicate whether the jury found that the defendants had actually conspired to murder Bowman."). However, the district court concluded that the Versaci Gambling Operation *was* underlying racketeering activity for the purpose of Tocco's Count 1 RICO conspiracy conviction. For the same reason, then, that we previously determined that we could not ignore the implication of the jury verdict on Count 6, we cannot ignore the implication of the district court's conclusion that the Versaci Gambling Operation was an underlying offense of Tocco's Count 1 RICO conspiracy conviction. If Tocco indeed agreed to the commission of the Versaci Gambling Operation -- as the district court found that he did -- then he must have done so as an organizer or leader of the operation.

We instruct the district court on remand to apply a four-level aggravating role enhancement to the Versaci

Gambling Operation offense level for the purpose of calculating Tocco's Count 1 RICO conspiracy base offense level.[9]

2. Edgewater Hotel Acts

The district court found that the alleged acts involving the Edgewater Hotel were not relevant conduct for the purpose of determining Tocco's Count 1 RICO conspiracy base offense level because "they were not, as to [Tocco], reasonably foreseeable acts in furtherance of the RICO conspiracy." J.A. at 240. We hold that the district court clearly erred in this finding. In our opinion regarding the government's appeal of the district court's forfeiture decisions, we explained that "the 'shall forfeit' language of [

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[9] We note that we conclude here that a different aggravating role enhancement applies to Tocco's Versaci Gambling Operation offense level than we concluded applied to Tocco's Hobbs Act conspiracy offense level. However, Tocco's role in the former offense was greater: whereas Nove Tocco and Paul Corrado organized and were the primary participants in the Hobbs Act extortion conspiracy, Tocco was the organizer of the Versaci Gambling Organization. *See* U.S.S.G. § 3B1.1, commentary, applic. note 4 ("In distinguishing a leadership and organizational role from one of mere management or supervision . . . factors the court should consider include the exercise of decision making authority, the nature of participation in the commission of the offense, the recruitment of accomplices, the claimed right to a larger share of the fruits of the crime, the degree of participation in planning or organizing the offense, the nature and scope of the illegal activity, and the degree of control and authority exercised over others.").

18 U.S.C. § 1963(a)] mandates that a district court assess forfeiture against the defendant when the facts support a finding of a sufficient nexus between the property to be forfeited and the RICO violation." *Corrado III*, 227 F.3d at 528.[10] We then held that:

> it was clear error for the district court to deny forfeiture against Jack Tocco and [Anthony] Giacalone, jointly and severally, for the profits that the members of the enterprise shared from the sale of the Edgewater Hotel. The continuing activities were related to the illegal purposes of the conspiracy charged, and Giacalone's and [Paul] Corrado's personal involvement confirms that the Cosa Nostra was involved in obtaining these illegal proceeds.

Id. at 528. Therefore, in a prior opinion, we have held that Tocco directly or indirectly benefitted from the Edgewater Hotel racketeering activities and that these activities were taken in furtherance of the RICO conspiracy for which Tocco was convicted.

Under the law of the case doctrine, generally we may not reconsider determinations made by this court at a prior

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[10] 18 U.S.C. § 1963(a)(1) & (3) provide that: "Whoever violates any provision of section 1962 of this chapter . . . shall forfeit to the United States . . . any property constituting, or derived from, any proceeds which the person obtained, directly or indirectly, from racketeering activity or unlawful debt collection in violation of section 1962."

stage of the litigation. *See Lac Vieux Desert Band of Lake Superior Chippewa Indians v. Michigan Gaming Control Bd.*, 276 F.3d 876, 879 (6th Cir. 2002). The government's forfeiture action was based upon Tocco's conviction, and we previously held that "the criminal forfeitures sought in this case constitute a part of the defendants' sentences . . . ." *Corrado III*, 227 F.3d at 528. We are thus bound in this appeal by the holdings we made both in Tocco's previous direct appeal and in the appeal involving Tocco's and his codefendants' forfeiture. Because we previously held that the district court clearly erred in denying forfeiture against Tocco for the Edgewater Hotel activities, we believe that we must now hold that the district court also clearly erred in concluding that the Edgewater Hotel activities were not reasonably foreseeable acts in furtherance of the RICO conspiracy. Therefore, the district court also erred in not including the Edgewater Hotel activities as relevant conduct for the purpose of calculating Tocco's Count 1 RICO conspiracy base offense level.

We instruct the district court on remand to include the Edgewater Hotel activities as an underlying offense in calculating Tocco's Count 1 RICO conspiracy base offense level.

3. Bowman Murder Conspiracy

The district court concluded that the Bowman murder conspiracy was not underlying racketeering activity for the purposes of determining Tocco's Count 1 RICO conspiracy base offense level. The court found that Tocco had no direct involvement in the murder conspiracy and that the conspiracy was not a reasonably foreseeable act in furtherance of the

criminal activity jointly undertaken by Tocco and his codefendants. We do not believe these findings are clearly erroneous. First, the only evidence that Tocco was directly involved in the Bowman murder conspiracy was Nove Tocco's testimony that when he and Paul Corrado presented their plan to kill Harry Bowman to Paul's uncle, Anthony Corrado, Anthony said that "they," meaning Anthony and Jack Tocco, would control the matter. J.A. at 2243-44 (Nove Tocco Test. at Resentencing Hearing). However, it is unclear from this testimony what "control" means, and, as the government concedes, other evidence indicates that instead of *causing* Paul Corrado and Nove Tocco to plan to murder Bowman, Jack Tocco actually *prevented* them from killing Bowman.[11]

Second, this same evidence could also demonstrate that the Bowman murder conspiracy was not reasonably foreseeable conduct in furtherance of Jack Tocco's jointly undertaken criminal activity with Nove Tocco and Paul Corrado. Although we would not necessarily have interpreted the evidence in this way, we believe that the district court could plausibly have found that the Bowman murder

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[11] Two FBI agents testified at trial that after listening to conversations between Nove Tocco and Paul Corrado in which they discussed the possibility of injuring law enforcement agents when carrying out their plan to murder Bowman, the FBI agents went to Jack Tocco and told him that if any law enforcement agent was injured, the FBI would hold him responsible. Forty-eight hours after the FBI agents spoke with Jack Tocco, Nove Tocco and Paul Corrado were informed of the FBI's warning to Jack Tocco and agreed to "lay low." J.A. at 742.

conspiracy was not in the scope of the criminal activity Jack Tocco agreed to undertake with Nove Tocco and Paul Corrado. As we have explained, "in order to hold a defendant accountable for the acts of others [under U.S.S.G. § 1B1.3(a)(1)(B)], a district court must make two particularized findings: (1) that the acts were within the scope of the defendant's agreement; and (2) that they were foreseeable to the defendant." *Campbell*, 279 F.3d at 399-400 (quoting *United States v. Studley*, 47 F.3d 569, 574 (2d Cir. 1995)). We have further stated that:

> In order to determine the scope of the defendant's agreement, the district court may consider any explicit agreement or implicit agreement fairly inferred from the conduct of the defendant and others. The fact that the defendant is aware of the scope of the overall operation is not enough to satisfy the first prong of the test and therefore, is not enough to hold him accountable for the activities of the whole operation.

279 F.3d 392, 400 (quotation omitted). Thus, the district court could have found in this case that because Jack Tocco prevented Nove Tocco and Paul Corrado from going through with their plan to murder Bowman, the murder conspiracy was not in the scope of Jack Tocco's agreement to conspire with Nove Tocco and Paul Corrado.

4. Hobbs Act Conspiracy

The district court concluded that the Hobbs Act conspiracy was not underlying racketeering activity for the

purpose of calculating Tocco's Count 1 RICO conspiracy base offense level.[12] Specifically, the district court stated that:

> The court having considered all the evidence, listened to and observed all witnesses at trial, listened to hours of tape recordings almost entirely of conversations between Nove Tocco and Paul Corrado, been present at the testimony this year of Nove Tocco, all of which it views in context against the imperative fundament of Jack Tocco's conviction on Counts 1, 2, and 6, concludes and finds that the "street tax" extortions of Nove Tocco and Paul Corrado were indeed

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[12] The district court refers to this as "merging" Count 6 into Count 1. J.A. at 234. If a district court finds, after a jury verdict, that convictions are duplicitous or multiplicitous and therefore in violation of the Double Jeopardy Clause of the Fifth Amendment of the United States Constitution, the court may "merge" the convictions in the sense of vacating the duplicitous or multiplicitous convictions. *United States v. Throneburg*, 921 F.2d 654, 657 (6th Cir. 1990); *see also Ball v. United States*, 470 U.S. 856, 84 L. Ed. 2d 740, 105 S. Ct. 1668 (1985). However, Tocco's conviction under RICO and his conviction under the Hobbs Act are not duplicitous; we have long maintained that the imposition of consecutive sentences for violations of RICO and its accompanying predicate offenses does not violate the Double Jeopardy Clause. *See United States v. Sutton*, 700 F.2d 1078, 1081 (6th Cir. 1983). Therefore, had the district court concluded that the Hobbs Act conspiracy was relevant conduct for the purposes of calculating Tocco's offense level for the Count 1 RICO conspiracy conviction, the court still should have independently calculated Tocco's offense level for the Count 6 Hobbs Act conspiracy conviction.

> independent of the overall Count 1 RICO conspiracy of which Jack Tocco was convicted and that therefore those extortionate acts of Nove Tocco and Paul Corrado are not relevant conduct for the purpose of offense level calculations as to Jack Tocco under Count 1.
>
> Indeed, the court can only conclude from the lengthy consideration that it has given all the evidence related to the relationship(s) and interactions between Nove Tocco, Paul Corrado, on the one hand, and Jack Tocco, on the other, that Nove Tocco and Paul Corrado carried out their "street tax" extortions in spite of the resistance and displeasure expressed consistently and in various ways by the older members of the Count 1 RICO conspiracy.

J.A. at 233. We conclude that the district court erred in not including the Hobbs Act conspiracy as relevant conduct for the purpose of calculating Tocco's Count 1 RICO conspiracy base offense level.

The district court found that the Hobbs Act conspiracy was "independent" of the Count 1 RICO conspiracy because the court found that Nove Tocco and Paul Corrado carried out the street tax extortion without Jack Tocco's approval. We note at the outset that this finding seems directly to contradict our previous conclusion that Tocco had a supervisory role in the Hobbs Act conspiracy. In our first opinion, as we explained above, we held that the district court clearly erred in finding that Tocco did not have a supervisory role in the Hobbs Act conspiracy, and we instructed the district court to

apply a three-level aggravating role enhancement on remand. *See Tocco*, 200 F.3d at 432. However, regardless of Tocco's role in the Hobbs Act conspiracy, we conclude that the Hobbs Act conspiracy should be included as relevant conduct for the purposes of Tocco's Count 1 RICO conspiracy base offense level on the facts of this case.

The Count 6 Hobbs Act conspiracy is listed as "underlying racketeering activity" in the Count 1 RICO conspiracy indictment, and Tocco was convicted of the Hobbs Act conspiracy. As we explained above, because the jury verdict for Count 1 was general, it is impossible to know whether the jury found that the Count 6 Hobbs Act conspiracy constituted a predicate act of Tocco's for the Count 1 RICO conspiracy. But we have held that "other verdicts of the same jury may serve the function of a special verdict on the predicate acts, where those other verdicts necessarily required a finding that the RICO defendant had committed the predicate acts." *Callanan v. United States*, 881 F.2d 229, 234 (6th Cir. 1989), *cert. denied*, 494 U.S. 1083, 108 L. Ed. 2d 946, 110 S. Ct. 1816 (1990). Therefore, we believe that Tocco's conviction for the Hobbs Act conspiracy serves the function of a special verdict on that predicate act; on the basis of Tocco's conviction for the Hobbs Act conspiracy alone, then, the district court should have included the Hobbs Act conspiracy as relevant conduct in calculating Tocco's Count 1 RICO conspiracy base offense level. *See Tocco*, 200 F.3d at 432 ("the district court ignored the fact that the jury found Tocco guilty on Count Six, the Hobbs Act violation").[13]

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[13] Pursuant to U.S.S.G. § 1B1.3(a)(1)(A), relevant conduct includes "all acts and omissions committed, aided, abetted, counseled, commanded, induced, procured, or willfully caused by

We concede, however, that the Hobbs Act conspiracy and the Count 1 RICO conspiracy could *theoretically* be independent. We can imagine a situation in which a person such as Tocco engaged in different conspiracies with different persons.[14] But, in this case, we have already held that the Hobbs Act conspiracy was part of the Count 1 RICO conspiracy. In the government's appeal of the district court's forfeiture decisions, we held that "the district court committed clear error in failing to hold Jack Tocco and [Anthony] Giacalone jointly and severally liable for forfeiture of the street tax proceeds." *Corrado III*, 227 F.3d at 528. We explained that:

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the defendant . . . that occurred during the commission of the offense of conviction, in preparation for that offense, or in the course of attempting to avoid detection or responsibility for that offense."

[14] In other words, a criminal conviction on a count regarding another conspiracy in addition to a criminal conviction on a RICO-conspiracy count does not *necessarily* require that the district court find the defendant accountable for the non-RICO conspiracy as relevant conduct for the purpose of determining the base offense level for the RICO conspiracy. *See* U.S.S.G. § 1B1.3, commentary, applic. note 1 ("The principles and limits of sentencing accountability under this guideline are not always the same as the principles and limits of criminal liability. Under subsections (a)(1) and (a)(2), the focus is on the specific acts and omissions for which the defendant is to be held accountable in determining the applicable guideline range, rather than on whether the defendant is criminally liable for an offense as a principal, accomplice, or conspirator.").

> The entire illegal scheme [of extortion] could not have succeeded were it not for the support, or the use of the name and the reputation of, the conspiratorial enterprise. Witnesses testified that they believed that Nove [Tocco] and Paul [Corrado] were supported by the larger organization of which they were a part. Recorded conversations between Nove and Paul indicate that they were working with (or for), or were empowered by, the "capos" Jack Tocco and Anthony Corrado. . . . The evidence showed that the scheme was related to the entire criminal enterprise of which these defendants were active members.

Id. As this holding is binding on us in this appeal, we conclude that the district court clearly erred in finding that the Hobbs Act conspiracy and the Count 1 RICO conspiracy were independent, and the court therefore also erred in not including the Hobbs Act conspiracy as relevant conduct for the purpose of calculating Tocco's Count 1 RICO base offense level.

We instruct the district court on remand to include the Hobbs Act conspiracy as an underlying offense in calculating Tocco's Count 1 RICO conspiracy base offense level.

5. Hobbs Act Object Offenses

The district court does not appear to have considered whether the acts of extortion alleged in connection with the Hobbs Act conspiracy were relevant conduct for the purpose of determining Tocco's Count 1 RICO conspiracy base

offense level. Instead, the court only addressed the acts of extortion in connection with determining Tocco's Count 6 Hobbs Act conspiracy offense level. We conclude that the district court erred by failing to address whether each act of extortion was relevant conduct for the purpose of calculating Tocco's Count 1 RICO conspiracy base offense level.

The government contends that nine acts of extortion -- and various specific offense characteristics -- should be included as relevant conduct for the purpose of calculating Tocco's Count 1 RICO base offense level. In its resentencing memorandum, the district court did not address the acts of extortion at all in its discussion of the relevant conduct for the Count 1 RICO base offense level. Having concluded that the Count 1 RICO conspiracy and the Hobbs Act conspiracy were independent of one another, the court perhaps believed it unnecessary to explain why each act of extortion was also independent of the Count 1 RICO conspiracy. However, inasmuch as we conclude above that the Hobbs Act conspiracy and the Count 1 RICO conspiracy are not independent, it is necessary for the district court to address whether each act of extortion is relevant conduct for the purpose of calculating Tocco's Count 1 RICO conspiracy base offense level.

We instruct the district court on remand to evaluate each of the nine acts of extortion that the government alleges constitute relevant conduct for Tocco's Count 1 RICO conspiracy base offense level pursuant to U.S.S.G. § 1B1.3. We note that in accordance with our discussion, *infra*, the district court must find that Tocco is accountable for at least one of the alleged acts of extortion. For that extortion act and any other extortion act the court finds Tocco accountable for,

then, the court must also determine whether Tocco is accountable for any specific offense characteristics pursuant to U.S.S.G. § 1B1.3.

C. Count 6 -- Hobbs Act Conspiracy

The district court concluded that Tocco's offense level for his Count 6 Hobbs Act conspiracy conviction was 21; the court concluded that Tocco's base offense level for the conspiracy was 18 pursuant to U.S.S.G. § 2B3.2(a), and the court applied a three-level aggravating role enhancement pursuant to U.S.S.G. § 3B1.1(b). Under U.S.S.G. § 1B1.2(d) "[a] conviction on a count charging a conspiracy to commit more than one offense shall be treated as if the defendant had been convicted on a separate count of conspiracy for each offense that the defendant conspired to commit." Count 6 charged Tocco with conspiring to commit nine specific acts of extortion. Therefore, for Count 6, Tocco could have been held accountable for all nine acts of extortion listed in that Count, his offense level for that Count then being derived pursuant to U.S.S.G. § 3D1.4. The commentary to U.S.S.G. § 1B1.2 cautions, however, that:

> Particular care must be taken in applying subsection (d) because there are cases in which the verdict or plea does not establish which offense(s) was the object of the conspiracy. In such cases, subsection (d) should only be applied with respect to an object offense alleged in the conspiracy count if the court, were it sitting as a trier of fact, would convict the defendant of conspiring to commit that object offense.

U.S.S.G. § 1B1.2(d), commentary, applic. note 5. As the jury verdict in this case was general for Count 6, the district court correctly applied the above standard. The court then found that for each act of extortion it "would not convict the defendant of conspiring to commit that offense." *See, e.g.*, J.A. at 249. But in order to sentence Tocco for Count 6, the court *had* to find that he conspired to commit at least one of the acts of extortion.

Count 6 of the indictment provided that:

> Defendants herein . . . did unlawfully, knowingly, and willfully combine, conspire, confederate, and agree together and with each other, to obstruct, delay, and affect commerce . . . and the movement of articles and commodities in such commerce, by extortion, . . . in that the Defendants did agree to obtain the property of Robert Monro, Jesus Morales, George Wierzba, Ramzi Yaldoo, John Johns, George Yatooma, Sam Martin, Daniel Abraham, and George Sophiea . . . .

J.A. at 180-81. If Tocco had not conspired to commit any of the acts of extortion charged in Count 6, the jury could not have convicted Tocco of Count 6. In fact, the jury instructions require as much. J.A. at 2135 (Jury Instr.) (requiring the jury to find for Count 6 "that some member of the conspiracy did some overt act for the purpose of advancing or helping the conspiracy").[15] Moreover, if Tocco had not conspired to

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[15] The same rationale applies here as applies in regard to the jury's conclusions involving predicate acts in a RICO conspiracy

commit any of the acts of extortion charged in Count 6, the district court could not have calculated Tocco's offense level for Count 6. In calculating an offense level for a conviction on a count charging a conspiracy to commit more than one offense, the court must look to the offense levels for the offenses the defendant conspired to commit. *See* U.S.S.G. § 1B1.2(d). Inasmuch as the court in this case concluded that Tocco's offense level for the Count 6 Hobbs Act conspiracy was 21, the court must have found that Tocco conspired to commit one of the acts of extortion charged in Count 6.

We instruct the district court on remand to reassess whether Tocco conspired to commit the various acts of extortion charged in Count 6 for the purposes of calculating his Count 6 offense level. Because all of the acts of extortion have the same base offense level pursuant to U.S.S.G. §2B3.2(a) and because the court must apply a three-level aggravating role enhancement to each act it finds Tocco conspired to commit pursuant to U.S.S.G. § 3B1.1(b) and our previous remand, it is possible that the court could still conclude on this remand that Tocco's offense level for Count 6 is 21. However, we also instruct the court on remand to explain which act or acts of extortion it finds that Tocco conspired to commit. As we explained above, any act of extortion that Tocco did conspire to commit should be included as relevant conduct for the purpose of calculating

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conviction. However, in order to convict a defendant of conspiracy under the Hobbs Act, a jury need only find that the defendant agreed to the commission of one predicate act; as explained above, in order to convict a defendant under RICO, a jury must find that the defendant agreed to the commission of at least two predicate acts. *See supra* note 5.

Tocco's Count 1 RICO conspiracy base offense level.[16]

D. Tocco's Cross-Appeal

In his cross-appeal, Tocco contends that the government should not have been able to argue at resentencing for either an aggravating role enhancement to the Versaci Gambling Operation offense level or that the Edgewater Hotel activities, the Bowman murder conspiracy, the Hobbs Act conspiracy, and the acts of extortion constituted underlying racketeering activity for the purpose of calculating Tocco's Count 1 RICO conspiracy base offense level. In addition, Tocco contends that the district court should have departed downwards from his sentencing range, as it did at the first sentencing, based on Tocco's and his wife's health. Both of these arguments are based on Tocco's view that this court's previous remand to the district court was "limited." We agree with Tocco that this court's previous remand was limited. However, we do not agree that our

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[16] We also note that in the resentencing memorandum, the district court mentioned that Tocco was acquitted for aiding and abetting the same acts of extortion that he was charged with conspiring to commit in Count 6. *See* J.A. at 262 ("Tocco was acquitted of aiding and abetting in these extortions"). The indictment did charge Tocco with ten counts of aiding and abetting specific acts of extortion. *See* J.A. at 185-88, 192, 199-201, 203-05 (Indictment, Counts 10 (Monro), 11 (Morales), 12 (Wierzba), 13 (Yaldoo), 17 (Johns), 20 (Yatooma), 21 (Martin), 23 (Abraham), 24 (Sophiea), and 25 (Calcaterra)). Tocco was aquitted on all ten counts. See J.A. at 207 (Judgment). We emphasize, however, that Tocco's culpability for aiding and abetting acts of extortion is different from his culpability for conspiring to commit those same acts.

remand limited the district court's ability to hear the government's arguments regarding Tocco's Count 1 RICO conspiracy underlying racketeering activity or to refuse to downward depart from the sentencing on the basis of Tocco's and his wife's health.

We have explained that "limited remands explicitly outline the issues to be addressed by the district court and create a narrow framework within which the district court must operate. . . . General remands, in contrast, give district courts authority to address all matters as long as remaining consistent with the remand." *United States v. Campbell*, 168 F.3d 263, 265 (6th Cir. 1999). In our first opinion, we explicitly instructed the district court in a number of ways. For instance, we instructed the court to impose a three-level aggravating role enhancement to Tocco's Count 6 Hobbs Act conspiracy offense level. However, the limitations we imposed on the district court on remand did not involve either the court's assessment of underlying racketeering activity for the purpose of calculating Tocco's Count 1 RICO conspiracy base offense level or the court's assessment of appropriate bases for downward departure.

In regard to the Count 1 RICO conspiracy underlying racketeering activity assessment, we stated that: "We instruct the district court to determine which underlying offenses may properly be attributable to Tocco for purposes of sentencing." *Tocco*, 200 F.3d at 430-31. We explicitly noted that the government argued on appeal that the Edgewater Hotel activities, the Bowman murder conspiracy, the Hobbs Act conspiracy, and the some of the acts of extortion constituted underlying racketeering activity for the purpose of calculating Tocco's Count 1 conspiracy base offense level. *Id.* at 429.

Therefore, the government's raising of those offenses at resentencing and its arguing for the four-level enhancement to the Versaci Gambling Operation offense level did not violate this court's mandate.

We also discussed the district court's downward departure from the sentencing range at length, and we instructed the court "to reconsider its decision to depart from the guideline range once that range has been redetermined." *Id.* at 432. We did not instruct the district court not to depart downward on the basis of Tocco's and his wife's health, but we strongly discouraged such departures. Thus, the district court's refusal to downward depart at resentencing on the basis of Tocco's and his wife's health was not outside the scope of our limited remand. Furthermore, the district court stated at resentencing that:

> In considering again the departure downward based on the defendant's health needs, the court concludes in May 2000 that those health needs are not so extraordinary or requiring that such a departure would now be appropriate. . . . The court concludes from the evidence at these more recent hearings that no downward departure based upon Mr. Tocco's health would be appropriate. . . . Similarly, the court's two-level departure downward based upon the mental and physical health problems of the defendant's spouse has been reconsidered. Based upon the witness called by the defendant to give testimony at the provisional hearings this year . . . and particularly the testimony elicited by the

> government's cross-examination, the court concludes that a downward departure based upon Mrs. Tocco's health would be inappropriate at this time.

J.A. at 264-65. Although the court does not state explicitly that it understands that it has the discretion to depart downward, it is clear from the above statement that the district court deemed a downward departure on the basis of Tocco's and his wife's health unwarranted. We have held that where the district court finds, based on the facts in the record, that a requested downward departure is unwarranted, it implicitly recognizes its discretion to depart downward, and, therefore, we cannot review such a failure to depart downward on appeal. *See United States v. Jones*, 102 F.3d 804, 809 (6th Cir. 1996); *see also United States v. Abdullah*, 162 F.3d 897, 905 (6th Cir. 1998) (holding that district court's decision was unreviewable where district court "entertained argument" and "clearly expressed recognition of his discretion to depart").

III. CONCLUSION

For the foregoing reasons, we **VACATE** Tocco's sentence and **REMAND** to the district court to recalculate Tocco's Count 1 RICO conspiracy base offense level and his Count 6 Hobbs Act conspiracy offense level. We note that even if the court finds on remand that Tocco is only accountable for one of the acts of extortion as relevant conduct for the purpose of his Count 1 RICO conspiracy base offense level, at minimum, Tocco's base offense level for the

Count 1 RICO conspiracy must be 24.[17] In combination with Tocco's offense level of 19 for Count 2 and Tocco's minimum offense level of 21 for Count 6, under U.S.S.G. §3D1.4 Tocco's total offense level must be at least 25.

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[17] In accordance with our opinion in this case, Tocco *must* be held accountable for the following underlying racketeering activities as relevant conduct for the purpose of his Count 1 RICO conspiracy base offense level: the Frontier Hotel activities (offense level 6); the Versaci Gambling Operation with a four-level aggravating role enhancement (offense level 16); the Edgewater Hotel activities (offense level 6); the Hobbs Act conspiracy (offense level 21); and one act of extortion (offense level 21). Pursuant to U.S.S.G. § 3D1.4, these combine for a base offense level of 24.

APPENDIX C

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

[Filed May 26, 2000]

No. 96-CR-80201

UNITED STATES OF AMERICA,
Plaintiff,

v.

JACK WILLIAM TOCCO,
Defendant.

HON. JOHN CORBETT O'MEARA

MEMORANDUM ON RESENTENCING

I. PROCEDURAL BACKGROUND

Defendant Jack William Tocco was charged March 14, 1996, in a twenty-five count Indictment along with sixteen co-defendants for violations of, *inter alia,* the Racketeer Influenced and Corrupt Organization Act, ("RICO"). Tocco

and five[1] other defendants were severed for trial from the others named in the suit.

Trial commenced January 27, 1998, and concluded with Tocco's April 29 1998 convictions under RICO for engaging in a pattern of racketeering activity (Count 1) and collection of unlawful debt (Count 2). In addition, he was convicted on one count of conspiracy to interfere with commerce by extortion in violation of 18 U.S.C. § 1951 ("Hobbs Act") (Count 6).

This court sentenced Tocco on November 13, 1998, to twelve months and one day of custody, departing downward ten levels[2] from the calculated guideline range, and recommended that his sentence be served in a community corrections center. Tocco filed a timely appeal from the court's judgment of conviction, and the government timely appealed Tocco's sentence. After the Bureau of Prisons determined its guidelines would not allow Tocco to be held in a community corrections center, Tocco reported to the Federal Medical Center at Rochester, Minnesota, on January 5, 1999, to serve his custody sentence. He was placed on Supervised Release on November 18, 1999.

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[1] One of the five, Anthony Zerrilli, was severed by mistrial after the jury was selected because a health problem caused his hospitalization.

[2] The court departed downward four levels for community involvement and support, four levels based on defendant's extraordinary health problems, and two levels because of his wife's health and need of his presence and support.

On January 5, 2000, the United States Court of Appeals for the Sixth Circuit issued its opinion and order affirming Tocco's convictions but vacating his sentence and remanding for re-sentencing. The Mandate, however, did not issue until April 20, 2000. In the meantime, this court, pursuant to agreement between the parties, conducted provisional evidentiary hearings on March 10 and 14 and on April 4 on issues relevant to Tocco's re-sentencing. The government and Tocco filed sentencing briefs April 18, 2000, and reply briefs April 25, 2000.

By Order of the court, at approximately noon on the first working day (April 21, 2000) following the issue of the court of appeals Mandate, Tocco entered detention in the medical unit of the Wayne County Jail.

II. MANDATE ON REMAND

In its Decision decided and filed on January 5, 2000, the Court of Appeals for the Sixth Circuit remanded this case for resentencing in a manner not inconsistent with its Opinion. More specifically, the court of appeals ordered this court to make findings with regard to which underlying criminal activity should be attributed to Tocco in calculating the appropriate offense levels resulting from his conviction of the Count 1 RICO conspiracy and his conviction of Count 6, conspiracy to interfere with commerce by extortion. The parties are in agreement that the appropriate offense level for Mr. Tocco's conviction of the Count 2 allegations is 19.

The court of appeals also directed this court to make findings of fact supporting any departures it might find are justified and consistent with the decision of the court of

appeals and to consider the term and conditions of any supervised release made part of the sentence.

III. PROPER OFFENSE LEVEL FOR DEFENDANT TOCCO'S COUNT 1 RICO CONVICTION

The proper base offense level is determined under United States Sentencing Commission Guidelines (USSG) 2E1.1.

Application Note 1 states that where there is more than one underlying offense, the court should treat each underlying offense as if it were contained in a separate count of conviction. It is the government's position that the defendant was involved in at least six underlying offenses: (1) extortion conspiracy (Count 6); (2) an illegal gambling operation; (3) involvement in the Edgewater Hotel; (4) involvement in the Frontier Hotel; (5) obstruction of justice; and (6) the Harry Bowman murder conspiracy. The Sixth Circuit stated that at resentencing the district court must make specific findings on what conduct may be considered as underlying offenses, what criminal activities were in furtherance of the RICO conspiracy, and what activities were reasonably foreseeable by the defendant.

Central to the analysis the court must undertake is to determine whether the acts committed by Nove Tocco and Paul Corrado, two defendants who also were convicted by the jury convicting Jack Tocco, were part of a concerted effort by an organization headed by Jack Tocco or whether, in the alternative, Nove Tocco and Paul Corrado carried out their

illegal activity (principally, collecting "street tax" from bookies) independent of the larger RICO conspiracy.

If the application of the relevant conduct provisions of the Sentencing Guidelines require that Jack Tocco be held accountable for the "street tax" extortions conducted by Nove Tocco and Paul Corrado, then those activities, the subject of the allegations and conviction in Count 6 of the Indictment, would be merged into Count 1.

If the court concludes that the "street tax" activities of Nove Tocco and Paul Corrado were in fact part of the larger Count 1 RICO conspiracy, the court must next proceed to identify and calculate the specific offense characteristics related to each victim of these extortions where both the extortion itself and the offense characteristics were reasonably foreseeable to Jack Tocco.

However, if the court finds that Nove Tocco and Paul Corrado operated independently from the larger RICO conspiracy as to which Jack Tocco was convicted under Count 1, the calculations of offense level for Count 6 would not be merged into Count 1's calculations.

The court will first analyze whether the extortionate activities of Nove Tocco and Paul Corrado which commenced in approximately 1991 (and which were specifically charged in Count 6) should be attributed as relevant conduct to Jack Tocco in calculation of the offense level related to the overall RICO conspiracy alleged in Count 1 of the Indictment.

The court will then examine which of the other acts the government argues underlie the conspiracy should be

attributed to this defendant for the purpose of calculating the offense level.

A. Whether it is Appropriate to Merge Count 6 into Count 1.

A synopsis of the evidence[3] at trial and the arguments from that evidence made by the government and the defendant follows:

The government states that at least as early as 1991, Nove Tocco, a second cousin to Jack Tocco, and Paul Corrado, the son of Dominic Corrado, received permission from Jack Tocco to engage in extortion by collecting protection monies, also known as "street tax," from sports bookmakers and numbers operators in the metropolitan Detroit area. Nove Tocco and Paul Corrado enlisted several other persons to assist them in their collection efforts with various sports bookmakers and numbers operators. The government further states that Nove Tocco and Paul Corrado were both advised and supervised in their unlawful activities by "capos" Anthony Zerilli and Anthony Joseph Corrado. Anthony Zerilli is Nove Tocco's uncle, while Anthony Joseph Corrado is Paul Corrado's uncle.

In support of its assertion that Jack Tocco gave his permission to collect a "street tax," the government relies on what it asserts is the historic, hierarchal structure of the

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[3] "The evidence" unless otherwise defined will refer to the evidence at trial and the evidence from testimony and documents received at the provisional re-sentencing hearings on March 10 and 14, and on April 4, 2000.

organization and an October 1992 conversation in which Nove Tocco stated, "Jack Tocco gave his fucking word. What's mine is mine. Now he wants to go back on his word...That doesn't mean I can't fucking squawk, Anthony." To support the fact that Anthony Zerilli and Anthony Joseph Corrado advised and supervised Nove Tocco and Paul Corrado, the government relies on the structure of the organization, electronic surveillance, and five meetings that comprise Count 1, Overt Acts 14, 18, 19, 20 and 28. These five overt acts are comprised of a January 10, 1992 meeting at Bobby T's Foods and Spirits between Anthony Joseph Corrado, Nove Tocco, and Paul Corrado; a February 10, 1992 meeting at Travis Restaurant between Anthony Joseph Corrado, Nove Tocco, Paul Corrado and John Sciarrotta; a February 10, 1992 meeting at the Spaghetti Palace between Anthony Zerilli, Nove Tocco, and Paul Corrado; a March 18, 1992 meeting at Luciano's Restaurant between Anthony Joseph Corrado, Paul Corrado, John Sciarrotta, and Norman Bagdasarian; and a June 17, 1992 meeting in a Sterling Heights Park between Anthony Tocco, who was acquitted of all charges by the same jury, Anthony Joseph Corrado, Paul Corrado, and Peter Corrado.

From 1991 through 1996, the government conducted surveillance of Nove Tocco and Paul Corrado, including tapping their cellular phones, placing recording devices inside their vehicles, and physical surveillance of their moves.

The government states that a review of the tapes and inferences to be drawn from them establishes that commencing as early as 1991, Nove Tocco and Paul Corrado devised a scheme to extort money from individuals not affiliated with the Detroit Cosa Nostra. Although Jack

William Tocco and Anthony Joseph Corrado were never intercepted during the electronic surveillance conducted in the automobiles and over the phones utilized by Nove Tocco and Paul Corrado, there are many conversations between the two as to the role played by Jack Tocco, Anthony Joseph Corrado and others. The government states that many of the references on the tapes to Jack Tocco concern the nature and parameters of the permission given to Nove Tocco and Paul Corrado concerning their right to collect street tax, the kind of actions they could employ to induce payment, and their relationship to other members of the organization.

In support of this the government refers to an intercepted conversation on January 20, 1992, when Paul Corrado and Nove Tocco discussed their efforts to secure a street tax from a Danny Triglia. Paul Corrado indicated that they would have trouble securing payments from Triglia because Paul Corrado's uncle, Anthony Corrado, was protecting him after Triglia supplied Anthony Joseph Corrado with clothes. Nove Tocco then tells Paul Corrado that his uncle, Anthony Zerilli, was not available to meet with them:

Paul Corrado: We're not gonna get it on unless your uncle sits down and straightens it out. Cause it's gonna be a major beef until somebody that looks, until somebody that my uncle (Anthony Corrado) looks at equally, tells him look, Tony, this ain't you know. The guy was never in it, if they had a sit down over that, we'd win.

Nove Tocco: You think so!

Paul Corrado: Sure we would.

Nove Tocco: You think Jack is gonna go with us?

Paul Corrado: I think if Tony and Tony sit down and ah, you know, there's two on one side with a couple on the other side and they say the guy was never a bookmaker what's right is right. I think they'll go for it. I really do. Because what's right is right.

Anthony Joseph Corrado stated that this conversation shows that, when informed of criminal behavior, he attempted to stop it. This is similar to Count 1, Overt Act 28, when Anthony Tocco, Anthony Joseph Corrado, Peter Corrado and Paul Corrado met at a park in Sterling Heights, Michigan. During this meeting, Anthony Tocco stopped Paul Corrado from trying to extort Jerry Capaldi, a business partner of his son. Again, Anthony Tocco was acquitted of all charges alleged in the Indictment.

To further show the parameters of the conspiracy, the government refers to an intercepted conversation on May 19, 1992, when Nove Tocco stated, "My Uncle Tony (Zerilli) says they don't want us to expand. We'll keep everything, everything we got... Jack Tocco's worried he's getting heat because of the name Tocco." Later in the conversation, Paul Corrado stated, "My uncle's (Anthony Corrado) gonna try to back us off everything we're doing. I'm telling you.., he's not gonna want us to finish up with this. We got three, four guys on that list. He's not gonna want us to finish up a guy like Ramzi." The government states that this conversation reflects

the need of Nove Tocco and Paul Corrado to gain approval for acts of violence from their superiors. Counsel for Jack Tocco states that it shows Nove Tocco and Paul Corrado, once again, did not get permission to commit illegal acts.

On May 19, 1992, Nove Tocco and Paul Corrado were intercepted discussing their problems collecting payments from Ramzi Yaldoo and Jesus Morales. After Paul Corrado insisted that they must do something to people who have not paid, Nove Tocco stated, "Well, that we never had permission to do, other than to, uh, other than to uh de, defend ourselves." Paul Corrado then stated, "We never got permission to kill the Mexican?" Nove Tocco replied, "Yeah, but never got permission to do this without defending our, other than defending ourselves."

On May 29, 1992, Nove Tocco, Paul Corrado, Anthony Zerilli, and Anthony Joseph Corrado met at the residence of Gerard DeMichele, Anthony Corrado's son-in-law. Before the meeting Paul Corrado is intercepted acknowledging that their efforts to collect a street tax posed a problem. Paul Corrado stated, "You're, you are exposing the bookmaking operation with the shakedown.., cause you guys never took a bust in all those years, cause you stayed quiet and low key. You stayed away from, you know, Jack Tocco and Tony Zerilli, and stayed away from all them guys that they really want." After the meeting Nove Tocco and Paul Corrado complain that they were instructed to stay away from "Faro."

Also, after the meeting Nove Tocco and Paul Corrado appear to be confident in their belief that they are not under the supervision of their elders. "Paul, do you know what that

meeting just meant?... They can't control us. They know they can't control us, and they're speaking to us like gentleman. I mean, isn't that what your Uncle Tony just did?" The defense contends that this statement proves that despite Nove Tocco and Paul Corrado's concern, the elder defendants are either unable or unwilling to control their activities.

Later on May 29, 1992, Nove Tocco and Paul Corrado are intercepted discussing plans to bomb Ramzi Yaldoo's car, charges later dismissed by the court. Nove Tocco stated that Anthony Joseph Corrado was startled when informed that they had tested a bomb and "his eyes got a little bigger." Paul Corrado stated that "he wanted to let us know that he knew what we was doing, you know, coming to him for help. Go to the masters."

The government also refers to an intercepted conversation on October 7, 1992, between Nove Tocco and Paul Corrado in which they discuss a dispute between them and Anthony Giacalone. Nove Tocco stated that he told Anthony Giacalone, Jr., "Your dad (Anthony Giacalone) knows the fucking rules. The business opened up. I went and carved out a section of it for me and Paul." it is after this that Nove Tocco stated, "Jack Tocco gave his fucking word. What's mine is mine. Now he wants to go back on his word ...That doesn't mean I can't fucking squawk, Anthony (Zerilli)."

The government next relies on intercepted conversations in December 1992 to show the hierarchal nature of the organization. On December 17, 1992, two FBI agents met with Jack Tocco. The meeting was in regard to an intercepted conversation in October 1992 in which Nove

Tocco and Paul Corrado were discussing the possibility of killing Harry "Taco" Bowman of the Outlaws Motorcycle Gang. During one of the discussions, they stated that if they were interrupted by law enforcement officers during the course of murdering Bowman, they would have no choice but to kill the officers in order to protect themselves. The government states that less than 48 hours after the meeting, Nove Tocco had learned all the details of the meeting. The government further stated that a review of the tape shows that Anthony Zerilli speculates that the FBI went to see Jack Tocco because they learned of his involvement in these activities because "Tony Zito was a dry snitch." On December 21, 1992, Nove Tocco was intercepted, stating, "Jack is awful worried that we're stirring pots."

The defendant states that this is a graphic example of his non-involvement in Nove Tocco and Paul Corrado's operation. They also refer to the conversation that Nove Tocco and Anthony Zerilli had in their car. During this conversation they discussed the fact that it had been made known to them that the FBI went to see Jack Tocco to tell him that individuals on the street were threatening police officers. The defendants state that the FBI agents testified at trial that Jack Tocco told them that this information was "bullshit" and that he had nothing to do with it. When the information that the FBI had gone to see Jack Tocco was discussed between Zerilli and Nove Tocco, the defendant states that Anthony Zerilli said with surprise: "They told who?" The defendants state that Zerilli and Nove Tocco spent a great deal of time trying to figure out why the FBI would have gone to see Jack Tocco and theorized that it was because a "dry snitch" gave the FBI false information. An excerpt of the conversation between Anthony Zerilli and Nove Tocco follows:

Nove Tocco: Now, we got, I got a message back today. Paul got, Paul told me. Says you got a message that the FBI went to, uh, Jack Tocco yesterday or the day before. I'm not sure when. And told the and told Jack that there's two guys on the street that want to hurt people and they threatened a cop and if anything happens, we hold you responsible.

Anthony Zerilli: They told who?

Nove Tocco: Jack Tocco. Threatened a cop, if anything happens, they're gonna hold him responsible. Jack Tocco.

Anthony Zerilli: Anything happens to who?

Nove Tocco: To whoever. If anything happens on the street they're holding Jack responsible. Now, this is the story I got from Jack supposedly, said but uh. I'm not sure this is correct. Uh, I take care of myself. I mind my own business. I'm responsible for me (unintelligible). And he told Peter, Peter Corrado who warned his brother who then told me today while we were shooting that this occurred sometime in the last two days. I heard about it yesterday at the...Peter got wind of it yesterday. I guess his Uncle Tony's gonna grab Paul and tell 'em.

Anthony Zerilli: Yeah. Tell 'em what?

Nove Tocco: That the FBI says we threatened a cop. I don't even know who this cop is we're supposed to have threatened. There's that guy from a few months ago, this is a little bit later this is eight months later.

Nove Tocco: Well, Paul was trying to ask me, what do you think and I says I think that this might be just instigated by Jerry Armaly or his sister, a dry snitch operation. He says.

Anthony Zerilli: Yeah.

Nove Tocco: What do you mean? I says because it's the perfect play. They said, now what do you think. Billy doesn't mean nothing after we went to him a second time? I says, so she now, maybe he don't do it, but it's a perfect woman's thing to make a phone call.

Anthony Zerilli: Yeah.

Nove Tocco: Get things stirred up.

Anthony Zerilli: Right.

Nove Tocco: He says, you don't think it was that other guy? I said, no, not eight months

later, no. Six months later, no. I don't believe it.

Anthony Zerilli: Yeah.

Nove Tocco: Why did I think they'd go to Jack. And I said, I don't know, like that. Why would they pick him. Why they would pick him is because.

Anthony Zerilli: Why go to Jack. More likely, they went, uh, I would, I, you know, I uh, said for a long time that, that, uh, Tony Zito was a dry snitch, a long time, when he was with Jack. Now his son said his father was a stool pigeon.

Nove Tocco: Is that right?

Anthony Zerilli: Yeah. So now, they thought his father, his son came to me and told me. I said, no, I just didn't, didn't. He is, was a dry snitch. He didn't get warned. Now outta that, i guarantee ya there may be some conversation about that because his son is going around saying that, uh, Tony Zito was a dry snitch, I mean, not a dry, that he was a, a stool pigeon.

Anthony Zerilli: So there's much, there would be a lot more boiling there, outta that situation than boiling outta of the other sit, the

one that you're talking about. Because you know, I got that Fred Zito over by Tony. And I told Tony, I said, you know, you can't trust this family. You know that Fred Zito.

Nove Tocco: That right.

Anthony Zerilli: You know, you gotta be, uh, you gotta be careful, uh, with that guy. He's around there, he's a handyman. Well, I don't let him see nothing. I said, yeah, but it's not that. It's these motherfuckers. You can't trust the family. And they give you more trouble just dry snitching, you can get in, uh, intentionally.

Nove Tocco: Well, I think that's a lot to do with a lotta problems that we think there's something going. It's the dry snitch starts it all.

Anthony Zerilli: Absolutely.

Nove Tocco: They don't have any fucking idea what they're.

Anthony Zerilli: Abso.

Nove Tocco: Dry snitching about.

Anthony Zerilli: Solutely. Absolutely.

Jack Tocco's attorneys state that during all of the electronic surveillance, not once does Nove Tocco or Paul Corrado talk to Jack Tocco on the phone, nor do they ever meet with him. They further state that during the course of the recorded conversations, Nove Tocco and Paul Corrado can be heard "gossiping" about stories that others had told them about Jack Tocco, Anthony Joseph Tocco and others. They state that this gossip included legends about some of these men being involved in some sort of a "combination" or gambling business which generated money from gambling during the year end at Christmas. The defendant's counsel states that it is equally clear from the conversations that Nove Tocco and Paul Corrado were not involved with either Jack Tocco or Anthony Tocco and wished to have nothing to do with them.

Jack Tocco's counsel gives two specific examples to support the contention that Nove Tocco and Paul Corrado wished to have nothing to do with him. First, when Paul Corrado remarried in 1991, Jack Tocco, the supposed head of this tight knit criminal organization, was not even invited to the wedding. Second, during a May 19, 1992 intercepted conversation, Nove Tocco complained to Paul Corrado that the Toccos (Jack and Anthony, who is referred to as "Tawn," his nickname) have not "done dick" for them and that the Toccos hate them, and they know it. In the same conversation, Nove Tocco and Paul Corrado talk about "whacking" the two brothers. An excerpt of the conversation follows:

Paul Corrado: Being treated like a fucking asshole.

Nove Tocco: Yeah.

Paul Corrado: Fuck Jack and Tawn.

Nove Tocco: You're probably right.

Paul Corrado: They're not gonna stop, like they're our fucking friends. They're not doing dick for us and they never will.

Nove Tocco: They ain't done dick for their own nephew.

Paul Corrado: And they hate us.

Nove Tocco: That's obvious.

Jack Tocco's counsel also states that in many conversations Nove Tocco and Paul Corrado claimed to go to many "sit downs," but the only Tocco that ever met with them was Anthony Tocco, who met them in a park to discuss the fact that they (Nove and Paul) were trying to collect a gambling debt from a business partner of Anthony Tocco's son. The defense states that there is no evidence that Jack Tocco was ever involved in this meeting or in Anthony Tocco's involvement with Paul Corrado and Nove Tocco concerning a debt collection.

The defense further states that no evidence was produced at trial that proved that Jack Tocco knew of any of the acts of Nove Tocco and Paul Corrado. They also state that the acts were not reasonably foreseeable to Jack Tocco and were not in furtherance of any activity he had undertaken. They state that, in fact, one of the bookies, Robert Monro, testified that the way Nove Tocco and Paul Corrado operated,

he thought they were more like renegades and that they weren't connected to any organized crime group but were just "loose cannons." The defense states that no evidence was produced that Jack Tocco knew of any alleged "bombs," the use of any weapons, or the alleged plans to kill anyone.

Anthony Joseph Corrado's attorneys state that during none of the extortionate collections are the victims told that Paul Corrado and Nove Tocco are acting on behalf of Anthony Joseph Corrado. Despite the fact that the government contends that Anthony Joseph Corrado supervised these two individuals and that he was the "capo" to Paul Corrado, the defense states that there was no occasion during over a year of surveillance when he was ever observed in a car with Nove Tocco or Paul Corrado; and no intercepted phone call exists in which either man is talking to Anthony Joseph Corrado, let alone seeking his advice and/or direction. Anthony Joseph Corrado also did not attend the wedding of his estranged nephew and alleged supervisee, Paul Corrado. The defense states that surveillance records placing Anthony Joseph Corrado in the company of Paul Corrado on a limited number of occasions is hardly sinister, given that they are related and given a family dispute that was ongoing during that time period over Paul Corrado's unsuccessful claim to interest in the family's vacation property at Higgins Lake, Michigan, following Dominic Corrado's death.

Anthony Joseph Corrado's attorneys state that there is never a statement by Paul Corrado or Nove Tocco complaining about, or even making passing reference that extortion payments or "skim" have to be paid to Anthony Joseph Corrado or Jack Tocco or that they are taking a "cut" of their profits. When specific conversations are recorded

about splitting of money or about yearly gross income, Anthony Joseph Corrado isn't mentioned at all. As an example the defense cites an October 7, 1992 telephone call that Nove Tocco has with his father, Paul Tocco, in which he provided in detail a breakdown of monies he took per year off the street:

> "Me and Paul are taking, we're generating about a hundred thousand dollars a year off the street... But it costs us twenty, twenty-five a year to do it. I mean, we pay Johnny Sciarrotta money. We pay this kid money .... We give him thirty percent... By the time all is said and done, me and Paul end up with about two thousand, twenty-one hundred a month."

The defense states that nowhere in those calculations is any payment to Anthony Joseph Corrado or to any "combination," "partnership," or any criminal enterprise. The money collected by Nove Tocco and Paul Corrado went directly to them after they paid off subordinates. Contrary to the government's theory, no money was given to the "organization" to then be fed back down the pipeline.

Anthony Joseph Corrado's attorneys further state that his limited involvement and interaction during 1991 and 1992 were primarily to halt the activities of Paul Corrado and Nove Tocco. They state that the conversations themselves reveal a pattern by Anthony Joseph Corrado of restraining extortionate or otherwise violent activity by others. They rely on the following statements to support their contention: on January 22, 1992, Nove Tocco complained, "It seems like Anthony Corrado hasn't gone after anybody he's called us off of;" on

May 29, 1992, when Paul Corrado and Nove Tocco are asked for a list of people they are collecting from, Paul Corrado complained, "My uncle's gonna try and back us off everything we're doing;" later on May 19, 1992, Paul Corrado told NoveTocco, "I've been home two years. They never OK'd one time."

The defense states that in other limited instances in which Nove Tocco and Paul Corrado refer to the older defendants, they are routinely expressing concern that the older defendants are stopping or intervening to prevent what the government characterizes as criminal activity by them. As examples, the defense cites a January 20, 1992 conversation in which it is alleged that Anthony Joseph Corrado was attempting to stop Paul Corrado from muscling Dan Triglia; on May 19, 1992, Paul Corrado stated that Anthony Joseph Corrado is "try[ing] to back us off everything we're doing;" also on May 19, 1992, Nove Tocco and Paul Corrado expressed concerns that someone will attempt to stop the supposed killing of "the Mexican," Jesus Morales; and on May 29, 1992, when Nove Tocco and Paul Corrado discussed the elders' attempt to stop an alleged extortion of "Faro."

The defense contends that Nove Tocco and Paul Corrado repeatedly state during these recordings that it was their own business, that they built it up, that no one gave them anything, and no one is going to tell them what to do. On May 19, 1992, they stated "we won't take orders.., we will accommodate 'em, but we're not gonna take an order." The only deference shown to any member of the older generation is, on occasion, to Nove Tocco's uncle, Anthony Zerilli, as is demonstrated by the following exchange: "and he's the only one that I'm gonna, if he said please do me a

favor, back off, I'd do it for him. Because I know he's fucking sincere." Anthony Zerilli is also the only elder defendant observed driving around in a vehicle with Nove Tocco and Paul Corrado. As to the remainder of the older defendants including his own uncle, Paul Corrado vowed on May 19, 1992, that "I'm not going to [back off] for a motherfucker."

To further rebut the notion that this was a single enterprise, the defense states that in a variety of conversations, Paul Corrado and Nove Tocco discuss two separate and competing "camps" when disputes arise over various collections involving "Larry" and "Joe Dee." In one camp is Nove Tocco and Paul Corrado. The other camp includes Paul Corrado's alleged "capo" Anthony Joseph Corrado. As the dispute degenerates, Paul Corrado and Nove Tocco muse variously that they might entertain the idea of "wacking the two brothers;" that they should confront and terrorize Anthony Joseph Corrado at some remote "designated" location such that he soils himself and has to wear "diapers;" and that they fear that Vito William Giacalone will be sent by his superiors to "wack them" once they realize that the elders can not control them. The defense contends that these statements do not show a single enterprise dedicated to a shared and common goal. In summary, the defense states that the trial evidence demonstrated that the only influence exercised by Anthony Joseph Corrado over the younger men was to restrain, halt or deter their alleged activities which are described below.

At the March 14, 2000 hearing, Nove Tocco testified that in early 1991 he and Paul Corrado began collecting their "street tax." A meeting was later held in which, according to

Nove Tocco, Jack Tocco told Nove that he didn't want any proceeds from the "street tax" but that it was a business that concerned him. Nove Tocco further testified that Jack Tocco then set up ground rules in which Nove and Paul Corrado were not to contact any bookmakers affiliated with the older and established relationships. The date of this meeting is relevant to the court's analysis of the relationship between the "street tax" operation and the RICO conspiracy. If the meeting occurred soon after the "street tax" began, it would tend to show that Jack Tocco did exert some control over Nove Tocco and Paul Corrado. The evidence on the date of the meeting is not really clear, however; and the court finds that substantially all the other evidence relating to the issue of control supports the proposition that Nove Tocco and Paul Corrado were working independently from the larger RICO conspiracy and that any involvement by the older co-defendants was for the purpose of assuring, if possible, that the activities of Nove Tocco and Paul Corrado did not call attention to the activities of the overall conspiracy and, therefore, inspire law enforcement scrutiny.

The court, having considered all the evidence, listened to and observed all witnesses at trial, listened to hours of tape recordings almost entirely of conversations between Nove Tocco and Paul Corrado, been present at the testimony this year of Nove Tocco, all of which it views in context against the imperative fundament of Jack Tocco's conviction on Counts 1, 2 and 6, concludes and finds that the "street tax" extortions of Nove Tocco and Paul Corrado were indeed independent of the overall Count 1 RICO conspiracy of which Jack Tocco was convicted and that therefore those extortionate acts of Nove Tocco and Paul Corrado are not relevant conduct for the purpose of offense level calculations

as to Jack Tocco under Count 1.

Indeed, the court can only conclude from the lengthy consideration that it has given all the evidence related to the relationship(s) and interactions between Nove Tocco, Paul Corrado, on the one hand, and Jack Tocco, on the other, that Nove Tocco and Paul Corrado carried out their "street tax" extortions in spite of the resistence and displeasure expressed consistently and in various ways by the older members of the Count 1 RICO conspiracy.

It is, therefore, the court's conclusion that the extortionate activity in the nature of "street tax" collections by Nove Tocco and Paul Corrado which are the bases of the Count 6 conviction of Jack Tocco are not relevant conduct for the purpose of calculating the offense level in Count 1 and that, therefore, Count 6 should not be merged into Count 1 for that purpose.

B. <u>Defendant Jack Tocco's Accountability to the Frontier Hotel Acts</u>

The government states that the evidence produced at trial established that in order to generate illegal income, the members of this organization engaged in a pattern of racketeering activities. These activities commenced in 1966 when two capos, Anthony Zerilli and Michael Polizzi, attempted to acquire a hidden interest in the Frontier Hotel and Casino in Las Vegas, Nevada. Both men were convicted of conspiracy to violate the Travel Act, in violation of 18 U.S.C. § 1952. The evidence established that this effort was conducted not only for their benefit, but also for the benefit of the organization, including Jack Tocco and Anthony

Corrado.

The defendants state that in 1971 an Indictment was handed down in the Frontier Hotel case. That Indictment charged five people from Detroit with conspiring to obtain a hidden interest in the Frontier Hotel, Jack Tocco was not charged in the Indictment nor was he ever implicated. Because of financial difficulties, the Frontier Hotel was eventually sold to Howard Hughes. The closing documents of the sale of the Frontier Hotel are public documents on file in Nevada; those closing documents do not reveal any money paid to Jack Tocco or to any "illegal partnership." The defendants further state that Angelo Polizzi testified at trial that his father told him $1,000,000.00 was paid to his father's group in Detroit, but there is no explanation of how this occurred nor any corroboration of this through records of the closing of the Frontier Hotel sale or from the records of anyone's bank account. Again, no money from the Frontier sale was ever shown to be paid to Jack Tocco or Anthony Joseph Corrado.

The only new evidence is Nove Tocco's testimony this year with regard to the Frontier Hotel. At the provisional sentencing hearing, Nove Tocco testified that at the age of 18 he flew to Las Vegas with the other individuals who were convicted in the Frontier case. He later saw Anthony Tocco and Jack Tocco and was asked what "he thought of the operation." The court finds that this is enough to tie Jack Tocco to the Frontier Hotel acts and that those acts were foreseeable and in furtherance of the Count 1 conspiracy.

C. Defendant Jack Tocco's Accountability for the Edgewater Hotel Acts

The government states that the evidence produced at trial established that in the early part of 1980, the Detroit Cosa Nostra attempted to gain control of the Edgewater Hotel and Casino in Laughlin, Nevada. On April 16, 1980, Jack Tocco and Anthony Joseph Corrado met with William Pompili at a Holiday Inn in Toledo, Ohio. Pompili was observed by surveillance agents carrying a briefcase and what appeared to be architectural plans with the name "Samuel Wac..." on them. (Later it was established that Samuel Wacht had received 4% interest in the Edgewater Hotel and Casino for architectural services.) The government had identified William Pompili as the organization's "straw man" in Nevada. He was also employed at the Edgewater Hotel and Casino from June 1981 to February 1982.

On July 22, 1980, agents observed Jack Tocco and Rafaele Quasarano meet at the Corfu Restaurant in Roseville, Michigan. Jack Tocco was overheard by agents discussing a place on the water, a 75-25 split and big name entertainers. The government stated that the place on the water referred to the Edgewater Casino, which is located on the Colorado River.

On September 3, 1980, Jack Tocco and Anthony Joseph Corrado met with Joseph Todaro, Sr., and Joseph Todaro, Jr., at Larco's Restaurant in Detroit, Michigan, allegedly to discuss the casino.

Prior to 1980, an undercover investigation by the FBI in Nevada revealed that in 1979 Anthony Joseph Corrado

traveled to Nevada to meet with William Pompili. At the time Pompili was having a dispute with Vincent James Palmisano, identified as a member of the Gambino crime family, over rights to provide gaming machines at the Edgewater Casino. The government stated that this shows that Anthony Joseph Corrado had a stake in the Edgewater Casino and Hotel. His counsel denies this.

The government stated that when the Nevada State Gaming Commission reviewed the application for gaming license of the Edgewater Hotel and Casino and its investors, it rejected 46% of the proposed ownership. The commission further found that the Edgewater Hotel and Casino had been "primed for a takeover" by the Detroit Cosa Nostra. The total amount that the Edgewater Hotel and Casino had to buy back from proposed owners amounted to $3.2 million. On August 18, 1982, Anthony Joseph Corrado, Vito William Giacalone, and William Pompili met at the Holiday Inn in Romulus, Michigan. At this time William Pompili was no longer employed by the Edgewater Casino. An FBI agent testified that he positioned himself in a hotel room adjacent to the Pompili room and was able to overhear conversations through a wall outlet. The conversation revolved around money that was owed and how they intended to get back into the casino business. The government stated that 46% interest that was rejected by the Nevada Gaming Commission, at $70,000.00 per percentage point, equals $3.2 million. This is the amount that the government contends was being discussed inside the Holiday Inn. Defense counsel, however, states that his amount is over stated because part of the 46% reflected investor Arthur Stone, who backed out due to the lack of funding and not rejection for organized crime affiliations.

The defendants also claim that the conversations were in fact sales pitches by Pompili to get into casinos. Instead of discussions about re-investing, the discussions were forward based and involved future plans. They also point out that the Edgewater divestment occurred in October 1981, ten months prior to the August 1982 meeting in Romulus, Michigan. Soon after that meeting, Circus-Circus took control of the Edgewater, thereby making any discussion of Edgewater moot. This would also contradict Angelo Polizzi's claim that in mid to late 1986 his father told him that the partnership had a very small interest in the Edgewater and that at that time they were trying to expand and make it more meaningful. The defendants argue that according to the government, the court would have to believe that Circus-Circus was associated with the defendant.

The defendants further state that during the investigation by the Nevada State Gaming Commission, William Pompili was questioned about his alleged organized crime connections. Although he was questioned extensively, he was never asked about Jack Tocco. They also state that if one compares the government's opening statement at trial, closing statement and post verdict briefs, the court would ascertain that the government's theory on the Edgewater has changed on at least three occasions. The defendants state that the first theory was that William Pompili obtained an investment in the Edgewater on behalf of individuals from Detroit through various front men and met in Toledo and Romulus to discuss the status of their investment. They state that the government's second theory was that William Pompili had obtained an investment in the casino, the investment had been lost, and the meeting in Romulus was to discuss reinvesting in the casino. The third theory would be that

Pompili was attempting to obtain an investment in the casino on behalf of people from Detroit, and the Toledo and Romulus meetings were meetings in which he was trying to convince them to invest.

The defendants state that the evidence at trial showed that Pompili was seeking investment money from Detroit but never got it. They also state that the government has failed to cite any authority for the proposition that it was illegal for anyone to solicit investment in a casino or to invest in one. The defendants state that their position on this issue is supported by reconciling the April 16, 1980 meeting in Toledo, Ohio, with Jack Tocco's overheard discussion.with Rafaele Quasarano at the Corfu Restaurant. The defendants state that the testimony by agents as to the statements overheard at the Corfu sounded like Jack Tocco summing up to Rafael Quasarano the sales pitch that Pompili had made to him regarding an investment in Edgewater. They state that there is no evidence that any investment took place.

The defendants state that there is no evidence of money flowing in any direction concerning the Edgewater Casino. Jack Tocco's involvement was limited to listening to a sales pitch in Toledo and later discussing this information with Rafael Quasarano. Anthony Joseph Corrado's involvement was limited to attending a sales pitch in Romulus in 1982 and mediating a dispute among two acquaintances in 1979.

On March 29, 1982, the Nevada State Gaming Commission filed a summary of a follow-up investigation that was conducted of the Edgewater Casino. The follow-up investigation was to report on the satisfaction of conditions

imposed by the Nevada Gaming Commission on October 22, 1981. The commission found that on October 29, 1981, the Edgewater Hotel Corporation redeemed shares of stock to persons who had withdrawn their applications. The transfers were required to be consummated prior to issuance of the gaming license. The following chart reflects the number of shares redeemed, percent of ownership that shares reflect, stock repurchase price, initial investment returned, total anticipated interest to accrue (a promissory note was signed by the Edgewater Corporation to repurchase the stock over a period of time with interest on the unpaid balance accruing at a rate of 10% per year), and total buyout:

Stockholder	Shares Redeemed	%	Repurchase Price
E. Manley	625.0	25.0	1,605,000
R. Glazer	237.5	9.5	604,280
V. Assemany	137.5	5.5	275,000
G. Kassab	50.0	2.0	60,000
Total	1,050.0	42.0	2,544,280

Stockholder	Initial Investment	Interest Accrued	Total Buyout
E. Manley	145,000	864,741	2,614,741
R. Glazer	60,720	198,735	863,735
V. Assemany	110,000	82,500	467,500
G. Kassab	80,000	18,000	158,000
Total	395,720	1,163,976	4,103,976

The stock redemption to Emmet Manley was for ten years in principal installments of $160,500.00 per year with quarterly interest payments. The other stock redemptions were to Ronald Glazer for five years with four principal payments of $100,000.00 and a balloon payment of $204,280.00 with quarterly interest payments; to Vincent Assemany for five years in principal installments of $55,000.00, with quarterly interest payments; and to Gabriel Kassab for five years in principal installments of $12,000.00, with quarterly interest payments. The Edgewater Corporation paid off the initial investments through a loan with First Interstate Bank of Nevada.

No evidences ties Jack Tocco to these acts.

The court finds that the Edgewater Hotel acts were not an underlying offense as to the defendant Jack Tocco because they were not, as to him, reasonably foreseeable acts in furtherance of the RICO conspiracy.

D. <u>Conspiracy to Murder Taco Bowman</u>

Harry Bowman, also known as "Taco," is, or was, the president of the Outlaws Motorcycle Club and at the time of the trial was a fugitive suspected of several murders. Beginning in December 1991 and continuing until at least October 1992, Nove Tocco and Paul Corrado began discussing murdering Bowman. Nove Tocco and Paul Corrado indicated they were waiting for approval for the murder from Anthony Joseph Corrado and that the reason they had been given for the planned murder was that Bowman had stolen a crap game from Jack Vito Giacalone. On at least two occasions, Nove Tocco and Paul Corrado surveilled

Bowman's residence on Merlin Street in Detroit and discussed the best time and best way for them to carry out the murder of Bowman. During their discussions, Nove Tocco and Paul Corrado agreed that if they were interrupted by law enforcement officers during the course of murdering Bowman, they would have no choice but to kill the officers in order to protect themselves.

There were no substantive counts charged in the Indictment with respect to these overt acts.

The court concludes that no evidence supports the proposition that the defendant Jack Tocco had any involvement with the conspiracy to murder Harry "Taco" Bowman. The court bases this conclusion on all the evidence at trial and again reflects upon the hours of tape recordings of conversations between Nove Tocco and Paul Corrado which became part of the trial evidence and the absence of any recent testimony by Nove Tocco in the provisional hearings held earlier this year that Jack Tocco had any such involvement. It finds and concludes that no such culpable relationship to the conspiracy to murder Harry "Taco" Bowman existed as to Jack Tocco and, therefore, it is not relevant conduct related to the calculation of the offense level as to his Count 1 RICO conspiracy conviction.

No evidences ties the Defendant Tocco to these acts.

The court finds that the Harry "Taco" Bowman acts were not an underlying offense as to Jack Tocco because they were not, as to him, reasonably foreseeable acts in furtherance of the RICO conspiracy.

E. Trogan, Stern and Moskal Overt Acts

In 1973, Nick Trogan was operating an illegal gambling business in the Saginaw, Michigan area. Trogan's partner in this bookmaking operation was Charles McNally. At the time, Trogan also operated Delmondo's Restaurant, and McNally owned various Texan restaurants. Both sets of restaurants were customers of Robinson Linen, which had been recently acquired as a subsidiary of the Melrose Linen Company, which was operated by Jack William Tocco and Anthony Joseph Corrado. Charles McNally's brother-in-law, Max Castle, was the manager of Robinson Linen. Anthony Joseph Corrado serviced the Saginaw/Bay City area for Melrose Linen and kept an apartment in the area. Trogan and McNally also referred other customers to Robinson Linen for business.

During the summer of 1973, Billy Loiacano, a nephew of Anthony Giacalone, informed Nick Trogan that he wanted him to meet two individuals. Later Trogan met with Loiacano, Anthony Giacalone and Vito William Giacalone at the Bay Valley Resort in Saginaw, Michigan. During this meeting the Giacalones informed Trogan that they were taking over his bookmaking operation. Trogan testified that he did not know the Giacalones personally, but he knew by reputation that they were involved with gambling in Detroit, Michigan. Based on newspaper articles he had read, he also thought they were involved in organized crime.

After the meeting Trogan spoke to his partner McNally about the issue. Trogan then believed that McNally called Anthony Joseph Corrado. Approximately two weeks later, Nick Trogan, Charles McNally, Max Castle, and an

Irving Berlin, along with their wives, were together at the Pine Knob Country Club in Oakland County. Approximately one hour into the gathering, Anthony Joseph Corrado arrived at the club. After he arrived, Charles McNally had a conversation with him that Trogan was not a party to. At the end of the evening, Anthony Joseph Corrado told the individuals "not to worry about anything, everything was all right, that the Giacalones didn't realize that we were friends of theirs."

Trogan further testified that Anthony Joseph Corrado never asked for money in exchange for this assistance nor did his restaurant have to pay exorbitant prices for their linens and/or pay for services that were never rendered. Trogan did not testify to paying any form of street tax or fees to the Detroit Cosa Nostra. Trogan also did not offer any testimony as to Jack Tocco's involvement in this incident. However, according to the government, he would have been a capo in the organization during this time-frame.

In 1977, Anthony Giacalone extorted approximately $50,000.00 from Harold Stern and controlled the loansharking business in Saginaw which made usurious loans to people such as Robert Moskal. Stern and Moskal testified at trial in regard to the extortion attempts relative to the Giacalones. The did not offer testimony as to the involvement of Jack Tocco and Anthony Joseph Corrado in these incidents. No evidence was produced at trial that showed Jack Tocco had any links to this activity or knowledge that these events had even occurred. The court concludes they are not an underlying offense because they were not reasonably foreseeable acts in furtherance of the RICO conspiracy.

No evidence ties Jack Tocco to these acts.

The court finds that the Trogan, Stern and Moskal acts were not an underlying offense as to the defendant Jack Tocco because they were not, as to him, reasonably foreseeable acts in furtherance of the RICO conspiracy.

F. Bagnasco Overt Acts

At the initial sentencing hearing, the court, through relevant conduct provisions, held the defendant Jack Tocco accountable for the overt act involving an illegal gambling enterprise which operated in 1981. That enterprise was owned and operated by Frank Versaci. The court found that Jack Tocco, by the preponderance of the evidence standard, was involved in the gambling operation but was not an organizer of the operation and makes that finding again here.

G. Obstruction of Justice Overt Act

The government states that this criminal organization was also able to corrupt the system of justice. When Vito Giacalone was under investigation for tax fraud, Anthony Corrado and his son Paul Corrado were able to induce an Assistant United States Attorney - tax division lawyer named Ted Forman (a personal friend of Paul Corrado who had been a member of his wedding party) to produce the special agent's report, which included among other things, grand jury materials and witnesses' names, addresses and identities. This, according to the government, was an obstruction of justice. Anthony Corrado utilized his son, Paul Corrado, as a conduit for a $5,000.00 payment from Vito Giacalone to Ted Forman in return for the investigation file.

Anthony Joseph Corrado was found guilty of Count 18, Obstruction of Justice. Jack Tocco was not charged with any substantive count involving these overt acts.

No evidence ties Jack Tocco to the acts.

The court finds that the obstruction of justice acts were not an underlying offense as to Jack Tocco because they were not, as to him, reasonably foreseeable acts in furtherance of the RICO conspiracy.

H. Carlo Catenacci Overt Acts

In 1992, Carlo Catenacci was the owner and operator of a construction company which operated in Michigan and Florida. Catenacci was approached by Tony Giacalone and Anthony Zerilli who offered both their assistance in Catenacci's business affairs and proposed his investment in a building project. Catenacci refused these offers. Zerilli then contacted Nove Tocco and had Nove Tocco arrange for Catenacci to be severely beaten. Zerilli then accompanied Nove Tocco on one occasion to point out Catenacci's residence in Harrison Township for him. Before the assault could take place, Catenacci was warned and steps were taken to prevent the planned assault.

With respect to this incident neither Jack Tocco or Anthony Joseph Corrado were charged in any substantive counts.

No evidence ties Jack Tocco to these acts.

The court finds that the Carlo Catenacci acts were not an underlying offense as to Jack Tocco because they were not, as to him, reasonably foreseeable acts in furtherance of the RICO conspiracy.

IV. PROPER OFFENSE LEVEL FOR THE DEFENDANT TOCCO'S CONVICTION ON COUNT 6

Consistent with U.S.S.G. 1B1.3, Application Note 3, because the court has concluded that the "street tax" extortion of Nove Tocco and Paul Corrado which are the subject of Count 6 of the Indictment were independent of the overall conspiracy, it must make specific findings as to the accountability of Jack Tocco for each of the nine such extortions as it pertains to the assessment of specific offense characteristics. The government contends that pursuant to U.S.S.G. 1B1.2(d), the court must treat each extortion as if the defendant had been convicted on a separate count. U.S.S.G. 1B1.2, Application Note 5, states, however, that particular care must be taken in applying subsection (d) because there are cases in which the verdict does not establish which offense(s) was/were part of the conspiracy. In such cases, subsection (d) should only be applied with respect to an object offense alleged in the conspiracy count if the court, were it sitting as a trier of fact, would convict the defendant of conspiring to commit that offense. The assessment of specific offense characteristics would then be governed by the relevant conduct provisions of U.S.S.G. 1 B1.3.

1. Robert Monro

In 1991, Robert Monro was operating a numbers business in partnership with George Wierzba, Tommy Davis, and a person known to Monro only as "George the Greek." Monro was also laying off numbers for a time to Jesus Morales, another numbers operator. Monro utilized the Big Boy restaurant located on Michigan Avenue near Oakman Boulevard in Dearborn, Michigan, as a place to meet a runner from "George the Greek" to pick up the night's sheets. In April 1991 or May 1991, Monro met "George the Greek's" runner, and later Tommy Davis and one of Davis' runners, at the Big Boy restaurant. Davis gave Monro approximately $15,000.00 at this meeting.

After having dinner and discussing their business, Davis and his runner left. Monro then went to his car, opened the passenger side door, and put the numbers sheets and $15,000.00 under the passenger seat. Monro then went to the driver's side door and entered the vehicle. As he was starting to shut the door, John Sciarrotta came up to the car and forcibly held the door open. Monro had heard that John Sciarrotta had been involved in several dice game robberies and initially thought that this was a robbery. At that time a red car came up to Monro's car and stopped with its front bumper near Monro's driver's side door. Paul Corrado and Nove Tocco got out of the red car and told Monro to get in their car because they wanted to talk to him. Monro suggested they go inside the restaurant, but they told him he was going for a ride with them. Monro was then ordered to get into the red car.

At that point, Monro tried to run. Sciarrotta grabbed him by his right arm and jacket, and Paul Corrado and Nove Tocco began throwing punches. These punches initially missed, but Monro was then hit solidly in the upper chest, with what he believes was a metallic object, and had the wind knocked out of him. Monro then lay on the rear of his car for a few minutes catching his breath, and he was again told to get in the red car.

Monro got in the front passenger seat of the red car, with Paul Corrado driving, Nove Tocco sitting in the rear behind Monro, and Sciarrotta sitting in the rear with Nove Tocco, and they all drove off from the restaurant. Paul Corrado and Nove Tocco then questioned him about his business and asked if he was still doing business with Jesus Morales. Paul Corrado and Nove Tocco then told Monro he would have to pay $1,000.00 per month to avoid any problems with his numbers business.

At some point in time, Paul Corrado noticed that Monro was looking at the door locks, and Corrado said, "Don't worry, if we wanted you dead you'd be dead already." At that point in time, Nove Tocco put his arm around Monro's shoulder from behind.

Paul Corrado and Nove Tocco asked Monro how much money he had with him and they took $800.00 Monro had in his wallet and told him that it was his first payment. Monro was dropped off in an alley near the Big Boy restaurant. After this incident, Monro told Tommy Davis to warn Jesus Morales about Paul Corrado, Nove Tocco, and John Sciarrotta.

Monro met Paul Corrado and John Sciarrotta at the Ram's Horn restaurant on Plymouth Road the next month and gave them $1,000.00 in cash. Paul Corrado told Monro that $1,000.00 per month wasn't good enough, and that it had to be $1,000.00 every two weeks. Monro agreed to pay $1,000.00 on the first and fifteenth of each month.

At the time for the next payment, Monro again met Sciarrotta at the Ram's Horn and paid him $1,000.00, but Monro then told Paul Corrado he didn't want to meet Sciarrotta anymore because of Sciarrotta's bad reputation. Paul Corrado told Monro to drop off the money at Jam Sounds on Warren Avenue which Monro did until September 1991. After the September 1991 payments had been made, Monro stopped paying and got out the numbers business. In total, Monro had paid Paul Corrado, Nove Tocco, and John Sciarrotta approximately $9,800.00 between April 1991 and September 1991.

On October 17, 1991, Paul Corrado and Nove Tocco went to Monro's house to collect the October payment but were told by Monro that he had stopped booking and would no longer pay them. Paul Corrado and Nove Tocco wanted to know how to contact Tommy Davis and George Wierzba, but Monro would not tell them.

With respect to this incident, Jack Tocco and Anthony Joseph Corrado were found guilty of Count 6, conspiracy to interfere with commerce by extortion and not guilty of Count 10, interference with commerce by extortion; aiding and abetting.

No evidences ties Jack Tocco to these acts.

The court finds that the Robert Monro extortion acts were not an underlying offense as to Jack Tocco because they were not, as to him, reasonably foreseeable acts in furtherance, of the conspiracy and the court as a trier of fact would not convict the defendant of conspiring to commit that offense.

2. George Wierzba

In 1992, George Wierzba was the operator of an illegal numbers business. He had been in partnership with Robert Monro, but that had ceased when Monro quit the numbers business in late 1991. Wierzba was also in partnership with Patrick Kelly, who owned Kelly's Corner, a bookstore located on Michigan Avenue in Detroit, Michigan, near another business called Airtime Communications.

In November 1991, Wierzba was approached at the Wyoming Lunch restaurant by Paul Corrado, Nove Tocco, John Sciarrotta, and Dominic Rubino. Paul Corrado, Nove Tocco, and Wierzba were observed in the parking lot outside the restaurant. Nove Tocco pulled Wierzba's jacket up in the rear and then patted him down. Paul Corrado was then observed talking to Wierzba and poking his finger in Wierzba's chest. Wierzba tried to back away, but he was backed into the wall about 10 minutes later. After this incident, Wierzba told Kelly that he was paying $1,000.00 "protection" money.

Wierzba paid Paul Corrado and Nove Tocco $1,000.00 a month. On at least one occasion Wierzba left $1,000.00 at Kelly's Corner which was picked up by John Sciarrotta. On other occasions, the $1,000.00 was picked up

by Norman Bagdasarian. Wierzba paid approximately $14,000.00 to Paul Corrado, Nove Tocco, Sciarrotta, and Bagdasarian.

In relation to this incident, Jack Tocco and Anthony Joseph Corrado were found guilty of Count 6, conspiracy to interfere with commerce by extortion and not guilty of Count 12, interference with commerce by extortion; aiding and abetting.

No evidences ties Jack Tocco to these acts.

The court finds that the George Wierzba extortion acts were not an underlying offense as to Jack Tocco because they were not, as to him, reasonably foreseeable acts in furtherance of the conspiracy and the court as a trier of fact would not convict the defendant of conspiring to commit that offense.

3. Jesus Morales

In 1991 and 1992, Jesus Morales was the operator of an illegal numbers business. Sometime earlier, Morales had met John Sciarrotta at a poolroom owned by Morales. The poolroom had closed, and Sciarrotta had approached Morales and told Morales that he might know someone who would buy it and offered to set up a meeting. Morales had heard that Robert Monro had been approached and roughed up by Sciarrotta and two other guys, so he refused Sciarrotta's offer to set up any meeting.

Later, Morales was approached at Hazel Park Race Track by Sciarrotta and told that he had a couple of friends

who wanted to speak to him. Sciarrotta then introduced Morales to Nove Tocco and another person. Nove Tocco said he was looking to layoff some large numbers action, and Morales told Nove Tocco that he had the wrong guy.

The next day, Sciarrotta asked Morales why he lied to his friends and told Morales they wanted him to pay $500.00 per week to stay in the numbers business. In order to get away from Sciarrotta, Morales told Sciarrotta he had to talk to his partner and he would let him know. Morales did not have a partner and began avoiding any contact with Sciarrotta and Nove Tocco. However, Sciarrotta eventually managed to contact Morales again, and this time Morales flatly told Sciarrotta that he would not pay.

After Morales refused to pay, Nove Tocco, Paul Corrado, and Sciarrotta decided to kill Morales; and they began surveilling Morales' residence and place of business in Detroit, Michigan.

In relation to this incident, Jack Tocco and Anthony Joseph Corrado were found guilty of Count 6, conspiracy to interfere with commerce by extortion and not guilty of Count 11, attempted interference with commerce by extortion; aiding and abetting.

No evidences ties Jack Tocco to these acts.

The court finds that the Jesus Morales extortion acts were not an underlying offense as to Jack Tocco because they were not, as to him, reasonably foreseeable acts in furtherance of the conspiracy and the court as a trier of fact would not convict the defendant of conspiring to commit that

offense.

4. John Johns

In early 1992, John Johns was the operator of a sports bookmaking business. Johns was accepting layoff wagers from another sports bookmaker, Sam Hakim, who operated a legitimate business known as Emily's Deli. Johns customarily met Hakim at Emily's Deli on Wednesday morning to settle up for the prior week's betting.

On January 24, 1992, Paul Corrado, Nove Tocco, and Peter Jack Corrado (Paul Corrado's brother) went to Elizabeth's By the Lake, a restaurant/bar located in St. Clair Shores, to attempt to locate Johns. Nove Tocco and Paul Corrado had earlier in the day purchased materials to make a black jack and had discussed severely beating Johns if he refused their demand to pay them.

Nove Tocco and both Corrados located Johns in the restaurant. They all went upstairs to an empty party hall area, and Johns was told that they knew he was doing business with Hakim and that he had to pay to continue to operate his sports bookmaking business. Johns told them he had to talk it over with his father and that he would get back to them.

Johns was later approached by Paul Corrado at Emily's Deli when Johns went there to settle up with Hakim. Paul Corrado told Johns that Hakim had taken care of Johns' problem. Johns stated that Hakim then shorted him $300.00 in settling up their wagers. Hakim told Johns that he had paid $300.00 to Paul Corrado and Nove Tocco on Johns' behalf. Johns stated he then stopped doing business with Hakim,

stopped booking for awhile, and avoided any further contact with Paul Corrado and Nove Tocco.

In relation to this incident, Jack Tocco and Anthony Joseph Corrado were found guilty of Count 6, conspiracy to interfere with commerce by extortion and not guilty of Count 17, attempted interference with commerce by extortion; aiding and abetting.

No evidences ties Jack Tocco to these acts.

The court finds that the John Johns extortion acts were not an underlying offense as to Jack Tocco because they were not, as to him, reasonably foreseeable acts in furtherance of the conspiracy and the court as a trier of fact would not convict the defendant of conspiring to commit that offense.

5. George Sophiea

In 1992, George Sophiea was the operator of a sports bookmaking business. Sophiea employed Thomas Toumajian as a writer in his bookmaking business.

In April 1992, Sophiea was approached by Paul Corrado, Nove Tocco, and Peter Jack Corrado at Hogan's Restaurant in West Bloomfield. Paul Corrado was armed at the time with a handgun.

Sophiea agreed to pay $500.00 per month "protection" money. Toumajian met Nove Tocco on numerous occasions to pay Nove Tocco. Sophiea paid because he believed Nove Tocco and the others were connected to the "mob." These payments lasted until September 1995 and totaled

approximately $20,500.00.

With respect to this incident, Jack Tocco and Anthony Joseph Corrado were found guilty of Count 6, conspiracy to interfere with commerce by extortion; Anthony Corrado was also found guity of Count 24, interference with commerce by extortion; aiding and abetting, while Jack Tocco was acquitted of this count.

No evidences ties Jack Tocco to these acts.

The court finds that the George Sophiea extortion acts were not an underlying offense as to Jack Tocco because they were not, as to him, reasonably foreseeable acts in furtherance of the conspiracy and the court as a trier of fact would not convict the defendant of conspiring to commit that offense.

6. <u>Ramzi Yaldoo</u>

Ramzi Yaldoo had been the operator of an illegal numbers business since 1982. In the past he had laid off numbers to George Wierzba. Yaldoo owned the Liquor Locker and Airtime Communications located on Michigan Avenue in Detroit, Michigan. John Jarjosa informed Paul Corrado and Nove Tocco about Yaldoo's numbers operation.

Yaldoo was also acquainted with John Sciarrotta. Sometime in 1992, Sciarrotta went into Airtime Communications and told Yaldoo some friends were interested in Yaldoo's numbers business and wanted to meet him. Yaldoo told Sciarrotta he did not want to meet anyone.

Yaldōo was later followed to work by Sciarrotta and other persons. Sciarrotta went into the store and told Yaldoo his friends were outside. Yaldoo then met Paul Corrado and Nove Tocco outside Airtime Communications, and they told him he had to pay the cost of doing business in order to continue the numbers business. Yaldoo said he wasn't paying because he wasn't doing any business. Paul Corrado and Nove Tocco told him to pay or stop.

Paul Corrado and Nove Tocco then decided to bomb Yaldoo's car to get him to pay. On May 9, 1992, Paul Corrado and Peter Anthony Corrado (the son of Anthony Corrado) detonated a test explosion. On May 13, 1992, Paul Corrado and Peter Anthony Corrado purchased materials to make a second device and went to Paul Corrado's residence to assemble it. On June 2, 1992, Paul Corrado, Nove Tocco, and John Sciarrotta attempted to bomb Yaldoo's car, which was parked outside Airtime Communications on Michigan Avenue. The plan was for Sciarrotta in one car to use a BB-gun to shoot out the rear window of Yaldoo's car, and Paul Corrado, in a car driven by Nove Tocco, to then light the pipe bomb and throw it into Yaldoo's car. They discontinued the attempt to bomb the car because after going to the location of Airtime Communications on Michigan Avenue, they decided there were too many people on the street.

Abandoning the bombing plan, Paul Corrado and Nove Tocco then decided to shoot out the windows at Airtime Communications to send a message to Yaldoo. On June 16, 1992, Nove Tocco drove the car while Paul Corrado, in the back seat of the car, shot out the store windows with a rifle. This act was observed by FBI agents.

When Yaldoo found out about the windows, he contacted John Jarjosa and they both went to meet Tom Lenhard to discuss the situation. Lenhard told Yaldoo that someone was sending him a message, and that he had better pay. Lenhard was paid by Paul Corrado and Nove Tocco for his helpful advise to Yaldoo. Jarjosa then set up a meeting with Paul Corrado and Nove Tocco at Trappers Alley in Greektown. Jarjosa told Yaldoo that Paul Corrado and Nove Tocco were "Mafia." When they reached the meeting, Nove Tocco patted Yaldoo down. They told Yaldoo that he had to pay to continue doing his numbers business. Yaldoo agreed to pay $1,100.00 per month, usually on or about the fifteenth of each month. Between July 1992 and July 1995, Yaldoo paid approximately $39,600.00.

In July 1995 and sometime later, Yaldoo was again contacted by Nove Tocco. Nove Tocco attempted to obtain $5,000.00 from Yaldoo as a final payment because Nove Tocco needed money to pay an attorney.

With respect to this incident Jack Tocco and Anthony Joseph Corrado were found guilty of Count 6, conspiracy to interfere with commerce by extortion. Anthony Joseph Corrado was also found guilty of Count 13, interference with commerce by extortion; aiding and abetting, while Jack Tocco was acquitted of this count.

No evidences ties Jack Tocco to these acts.

The court finds that the Ramzi Yaldoo extortion acts were not an underlying offense as to Jack Tocco because they were not, as to him, reasonably foreseeable acts in furtherance of the conspiracy and the court as a trier of fact

would not convict the defendant of conspiring to commit that offense.

7. George Yatooma

In 1992, George Yatooma was the operator of an illegal numbers business and had been one for over fifteen years. Yatooma was a close friend of Ramzi Yaldoo. John Jarjosa advised Paul Corrado and Nove Tocco about Yatooma and assisted them in contacting and extorting Yatooma.

Yatooma had heard about Nove Tocco and Paul Corrado extorting people and had successfully avoided being contacted by them for some time. However, Yatooma was finally tracked down by Nove Tocco telephonically, and he agreed to meet Nove Tocco. They met at Elizabeth's By the Lake, where Nove Tocco told Yatooma that the "old men" knew who he was and that he had to pay $1,500.00 to stay in business. Yatooma thought that Nove Tocco represented the "Mafia" and knew that Yaldoo's store windows had been shot out. Yatooma agreed to pay $1,500.00 a month. Most of the payments were made at the Sahara restaurant in Oak Park. Yatooma paid Nove Tocco approximately $49,500.00 from October 1992 through July 1995.

In July 1995, Yatooma and Ramzi Yaldoo were again contacted by Nove Tocco. Nove Tocco attempted to obtain $5,000.00 from Yaldoo and Yatooma as a final payment because Nove Tocco needed money to pay an attorney.

With respect to this incident, Jack Tocco and Anthony Joseph Corrado were found guilty of Count 6, conspiracy to interfere with commerce by extortion. Anthony Joseph

Corrado was also found guilty of Count 20, interference with commerce by extortion; aiding and abetting, while Jack Tocco was acquitted of this count.

No evidences ties Jack Tocco to these acts.

The court finds that the George Yatooma extortion acts were not an underlying offense as to Jack Tocco because they were not, as to him, reasonably foreseeable acts in furtherance of the conspiracy and the court as a trier of fact would not convict the defendant of conspiring to commit that offense.

8. Sam Martin and 9. Daniel Abraham

In 1992, Sam Martin was the operator of a sports bookmaking business which was being financed by Daniel Abraham. John Jarjosa told Paul Corrado and Nove Tocco about Martin and Abraham.

In 1992, Martin was approached by Nove Tocco in the Kenilworth Pub. Nove Tocco told him he wanted money for "street protection." Martin told Nove Tocco he didn't have any money. In September 1992, Nove Tocco again approached him at the Kenilworth Pub and told Martin if he did not pay he would be out of business. Martin told Abraham about these meetings and stopped doing "pay and take" at the Kenilworth Pub.

Daniel Abraham was then contacted by Nove Tocco. Abraham met Nove Tocco and Paul Corrado at his place of business, Drink's Saloon, which is located in Brownstown Township. Abraham agreed to pay $400.00 per month "street

tax" to them. Abraham paid for three or four months and then told Nove Tocco he was going out of business.

With respect to this incident, Jack Tocco and Anthony Joseph Corrado were found guilty of Count 6, conspiracy to interfere with commerce by extortion. Anthony Joseph Corrado was also found guilty of Count 21, attempted interference with commerce by extortion; aiding and abetting, and Count 23, interference with commerce by extortion; aiding and abetting. Jack Tocco was acquitted of Counts 21 and 23.

No evidences ties Jack Tocco to these acts.

The court finds that the Sam Martin and Daniel Abraham extortion acts were not an underlying offense as to Jack Tocco because they were not, as to him, reasonably foreseeable acts in furtherance of the conspiracy and the court as a trier of fact would not convict the defendant of conspiring to commit that offense.

In summary, the court concludes, consistent with its earlier ruling, that Jack Tocco could not have foreseen any of the specific characteristics of the extortions of Monro, Wierzba, Morales, Johns, Yaldoo, Sophiea, Yatooma, Martin and Abraham, and is not to be held accountable for those characteristics.

The court also finds, consistent with the instruction of the Court of Appeals for the Sixth Circuit, that three additional levels should be added to the calculation of the offense level for the defendant's role in the offense.

The calculation for the offense level for Count 6, therefore, would be 18 plus the role in the offense adjustment of 3, for an adjusted offense level of 21.

V. CALCULATION OF THE OFFENSE LEVEL

A. Count 1: Racketeer Influenced and Corrupt Organizations - Conspiracy

The applicable guideline for an 18 U.S.C. § 1962(d) offense is found in U.S.S.G. 2E1.1. That section directs the court to apply a base offense level of 19 or the offense level applicable to the underlying racketeering activity, whichever is higher. U.S.S.G. 2E1.1, Application Note 1, states that when there is more than one underlying offense, the court must treat each offense as if it were contained in a separate count of conviction. In Count 1, there are 43 overt acts, involving nine underlying activities. The court found that the defendant should be held accountable for the underlying activity involving the Frontier Hotel and the Versaci/Mirabile/Bagnasco gambling business. As such, the following guideline calculations will apply for Count 1:

1. Count 1, Overt Act 1: Frontier Hotel

Base Offense Level: The guideline for an 18 U.S.C. § 1952 offense (Interstate Travel in Aid of Racketeering) is found in U.S.S.G. 2E1.2(a). That section provides that the base offense level is either six, or the offense level applicable to the underlying unlawful activity in respect to which the travel or transportation was undertaken. The underlying criminal activity was a violation of regulations of the Nevada Gaming Commission for which there are not any analogous

federal offenses. As such, the base level, pursuant to U.S.S.G. 2E1.2(a)(1) would be six. 6

Specific Offense Characteristics: None 0

Victim Related Adjustment: None 0

Adjustment for Role in the Offense: As the Government notes in the *Government's Proposed Corrections to the Presentence Investigation Report Regarding Jack William Tocco,* filed on February 23, 2000, there are no role adjustments applicable to this offense. 0

Adjustment for Obstruction of Justice: None. 0

Adjusted Offense Level (Subtotal):

6

2. Count 1, Overt Act 9: Mirabile/Bagnasco/et al.

Base Offense Level: The guideline for an offense involving a violation of 18 U.S.C. § 1955 is found in U.S.S.G. 2E3.1(a)(1)(A). That section provides that the base offense level is 12. 12

Specific Offense Characteristics: None 0

Victim Related Adjustment: None. 0

Adjustment for Role in the Offense: At the initial sentencing, the court ruled that a role enhancement was not applicable. 0

Adjustment for Obstruction of Justice: None Adjusted Offense Level (Subtotal): 0

3. Multiple Count Adjustment With Respect to Count 1

		Units
Adjusted Offense Level for Group 1	6	½
Adjusted Offense Level for Group	2	1
Total Number of Units		1 ½
Greater of the Adjusted Offense Levels Above	12	
Increase in Offense Level (§3D1.4)	1	
Combined Adjusted Offense Level	13	

As the offense level applicable to the underlying racketeering activity is 13, U.S.S.G. 2E1.l(a) dictates that the greater offense level of 19 be used in the calculation for Count 1 of the Indictment.

B. Count 2: RICO - Collection of Unlawful Debt

Base Offense Level: The guideline for an 18 U.S.C. §1962(d) offense is found in U.S.S.G. 2E1.1(a)(1). That section provides that the base offense level is 19. 19

Specific Offense Characteristics: None. 0

Victim Related Adjustment: None 0
Adjustment for Role in the Offense: None. 0

Adjustment for Obstruction of Justice: None. 0

Adjusted Offense Level (Subtotal): 19

C. Count 6: Conspiracy to Interfere with Commerce by Extortion

Count 6 involves the extortions of Robert Monro, George Wierzba, Jesus Morales, John Johns, Ramzi Yaldoo, George Sophiea, and George Yatooma. Jack Tocco was acquitted of aiding and abetting in these extortions. Following U.S.S.G. 1B1.2, Application Note 5, the court must find that the guideline application of U.S.S.G. 1Bl.2(d) is not applicable.

Base Offense Level: The guideline for an 18 U.S.C. § 1951 offense is U.S.S.G. 2B3.2(a). That section provides that the base offense level is 18. 18

Specific Offense Characteristics: The court must conclude that the Specific Offense Characteristics are not applicable based on the defendant's remoteness, lack of control/direction, and foreseeability. 0

Victim Related Adjustment: None. 0

Adjustment for Role in the Offense: Pursuant to the Sixth Circuit ruling dated January 5, 2000, the defendant's offense level is increased by three levels, pursuant to U.S.S.G. 3B1. l(b) for an aggravating role. +3

Adjustment for Obstruction of Justice: None	0
Adjusted Offense Level (Subtotal):	21

D. Multiple Count Adjustments for Counts 1, 2 and 6:

Each count represents more than one victim and distinct harms. According to the multiple count rules, they cannot be grouped. Therefore, each count forms its own separate group.

		Units	
Adjusted Offense Level for Count 1	19	1	
Adjusted Offense Level for Count 2	19	1	
Adjusted Offense Level for Count 6	21	1	
Total Number of Units			
Greater of the Adjusted Offense Levels Above	21	3	
Increase in Offense Level (§3D1.4)	3		
Combined Adjusted Offense Level	24		24
Adjustment for Acceptance of Responsibility: None.			0
Total Offense Level:			24
Chapter Four Enhancements: None			0
Total Offense Level:			24

Guideline Sentencing Range

Based on a total offense level of 24 and a Criminal History Category of I, the guideline imprisonment range is 51 to 83 months. Chapter Five, Part A, Sentencing Table.

VI. DEPARTURES

When Jack Tocco was originally sentenced by this court on November 13, 1998, the court departed downward a total of ten offense levels based upon: the defendant's community involvement and community support, four levels; his extraordinary health conditions, four levels; and the health problems of his wife which required his presence and support, two levels.

In considering again the departure downward based upon the defendant's health needs, the court concludes in May 2000 that those health needs are not so extraordinary or requiring that such a departure would now be appropriate.

At the provisional hearings held by agreement between the parties after the court of appeals decision was announced on January 5, 2000, there was testimony with regard to Mr. Tocco's health problems. Before Jack Tocco's first sentencing, a number of letters and affidavits from medical professionals were filed with the court. However, no witnesses were then called; and there was, therefore, no opportunity for government cross-examination. The government was able to cross-examine the witnesses called by the defense in March 2000 with regard to the defendant's health. The court concludes from the evidence at these more

recent hearings that no downward departure based upon Mr. Tocco's health would be appropriate.

However, the overarching analysis leading to the court's conclusion that it will not depart downward based upon Mr. Tocco's health is that he was in custody for approximately ten months at the Rochester Medical Facility of the Bureau of Prisons. It was, from a medical and healthcare point of view, an uneventful and adequately provided for incarceration.

The court concludes it will not depart downward under U.S.S.G. 5H1.4.

Similarly, the court's two-level departure downward based upon the mental and physical health problems of the defendant's spouse has been reconsidered. Based upon the witness called by the defendant to give testimony at the provisional hearings this year concerning Mrs. Tocco's mental and physical health problems and her need for support, and particularly the testimony elicited by the government's cross-examination, the court concludes that a downward departure based upon Mrs. Tocco's health would be inappropriate at this time.

The downward departure for community support and involvement which was part of the original sentence of Jack Tocco, however, is another story. The court of appeals invited this court to give careful attention to whether the defendant's community involvement was simply a matter of giving money, possibly derived from illegal activity, or rather involved the contribution of the defendant's time and energies for the good of the greater community.

There is simply no question that Jack Tocco over a period of decades, contributed substantially and in quite extraordinary ways of his time and energy and skill to the various civic, charitable and religious undertakings which received his attention. And there were many. Father Joseph Rinaldi testified at the provisional hearings this year of Mr. Tocco's very personal involvement in the St. Louis Center, in Chelsea, Michigan.

Mr. Tocco has also been active and has devoted time and energy to countless other activities for the good of the community. A partial list of those developed from the many letters received by the court prior to the initial sentencing of Mr. Tocco would include the following:

St. Louis Center, Chelsea, Michigan
Holy Family Church, Detroit
Madonna del Grazia Club
St. Ambrose Elementary School Building Fund
Italian American Delegates
Italian American Cultural Society
Capuchin Soup Kitchen
Children's Hospital
Henry Ford Hospital Hospice of Michigan
Multiple Sclerosis Foundation
Operation Kindness
Grosse Pointe Park Little League
Grosse Pointe Park Dad's Club
Grosse Pointe South High School Choir
Boys and Girls Clubs of Michigan
Tivoli Manor

The court finds that Mr. Tocco meets the legal standards for a downward departure for extraordinary community involvement and support and that such departure downwards by 4 offense levels is consistent with the decision of the court of Appeals.

VII. SENTENCE

At offense level 20, criminal history Category I, the prescribed sentencing range is 33-41 months. Defendant Jack Tocco is hereby sentenced as follows: custody 34 months, fine $75,000.00, pay cost of incarceration and supervised release, 2 years' supervised release[4] - standard conditions.

/s/ _____
John Corbett O'Meara
Unites States District Judge

Date: May 26, 2000

[4] As instructed by the court of appeals decision, the court has again considered the term and conditions of supervised release and modified the conditions imposed somewhat.

APPENDIX D

UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

Nos. 98-2312/98-2426; 99-1003

[Filed January 5, 2000]

United States of America,
Plaintiff-Appellee/ Cross-Appellant
(99-1003),

v.

Jack William Tocco,
Defendant-Appellant/ Cross-Appellee.
(98-2312/2426)

Appeal from the United States District Court
for the Eastern District of Michigan at Detroit
No. 96-80201
John Corbett O'Meara, District Judge

JUDGES

Before: WELLFORD, NELSON, and GILMAN, Circuit Judges.

OPINION

HARRY W. WELLFORD, Circuit Judge.

This criminal prosecution pertains to one of six defendants who were tried on charges of conspiracy to conduct and participate in a Detroit-based racketeer influenced and corrupt organization.[1] Appellant Jack W. Tocco ("Tocco") was convicted on two counts of conspiracy in violation of the Racketeer Influenced and Corrupt Organization Act, 18 U.S.C. § 1962 (d) ("RICO") -- one for engaging in a pattern of racketeering activity and one for collection of an unlawful debt (Counts One and Two) -- and one count of conspiracy to interfere with commerce by extortion in violation of 18 U.S.C. § 1951 ("Hobbs Act") (Count Six). Both Tocco and the government now appeal -- Tocco from the jury convictions, the government from the sentence imposed by the trial judge.

A. Background[2]

On March 14, 1996, Tocco was charged in a twenty-five (25)-count indictment along with sixteen (16) co-defendants on charges relating to the activities of a group

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[1] The six co-defendants were Jack W. Tocco (appellant), Anthony J. Tocco, Anthony J. Corrado, Anthony J. Zerilli, Nove Tocco, and Paul Corrado. Before testimony was taken, Zerilli's case was severed due to health reasons.

[2] The factual background of this case spans three decades and will be discussed only insofar as the facts relate to the issues on appeal.

called "Cosa Nostra," also known as "the Outfit" or, as is known to the general public in the United States, "the Mafia." Cosa Nostra allegedly is made up of "families" in various cities, including Detroit, and allegedly is involved in illegal activities such as extortion, illegal lotteries ("numbers"), bookmaking, loansharking, and acquiring undisclosed and illegal investments in gambling casinos. The indictment herein alleged that Tocco had been involved in the Detroit branch of the national Mafia organization, and that he had been the "Boss of the Detroit Cosa Nostra Family" since about 1979. The district court severed the trial of Tocco and his five co-defendants from the trials of the others named in the indictment.

On January 27, 1998, trial commenced against Tocco and his co-defendants. Approximately three months later, on April 29, 1998, the jury convicted Tocco on the two RICO conspiracies and the Hobbs Act conspiracy mentioned above. It acquitted him on ten counts of extortion or attempted extortion. On October 23, 1998, the district court denied the government's request for a forfeiture judgment against all the defendants.

On November 13, 1998, the district court sentenced Tocco to twelve months and one day in prison, departing downward ten levels from the applicable guideline range, and recommended that Tocco's sentence be served in a community correction center. Tocco filed a timely appeal from the district court's judgment of conviction, and the government timely appealed Tocco's sentence.

B. Voir Dire

Tocco first challenges the adequacy of the jury voir dire. A district court's manner of conducting voir dire is not reversible unless the court abused its discretion. *See United States v. Phibbs*, 999 F.2d 1053, 1071-72 (6th Cir. 1993). It is well-settled that the district court enjoys broad discretion in establishing its voir dire procedures. *See United States v. Lanier*, 33 F.3d 639, 657-59 (6th Cir. 1994) (citing *Mu'Min v. Virginia*, 500 U.S. 415, 427, 114 L. Ed. 2d 493, 111 S. Ct. 1899 (1991)), vacated on other grounds, 114 F.3d 84 (6th Cir. 1997); *see also Deel v. Jago*, 967 F.2d 1079, 1087 (6th Cir. 1992) (same).

Tocco claims that he was denied his right to a fair trial because the district court declined to permit specific questions during voir dire on the subject of Mafia prejudice. Tocco's counsel filed a motion requesting that the prospective jurors be asked whether they possessed any strong opinions about the Mafia, or whether they believed that Italian-Americans were more likely to be members of organized crime. The motion was accompanied by Detroit newspaper articles referring to "Detroit's Mob" and the Detroit Mafia. Tocco claims that the district court's denial of that motion constituted reversible error because of the very high-profile nature of the case and the substantial unsympathetic publicity in the media.

The government argues that the district court was not compelled to allow questions on the specific issue of Mafia prejudice, and that the questions posed to the prospective jurors were adequate to ensure Tocco a fair and impartial jury. The district court asked the prospective jurors to answer the following in the juror questionnaire:

> 41. You are being asked to participate in jury selection process that will select a jury to try a criminal case in which the government prosecutors charge several defendants with involvement in a racketeering conspiracy. The government alleges that the defendants are participating in a conspiracy call [sic] "Cosa Nostra" or the "Mafia." To the best of your knowledge, have you heard anything about this case? ___ yes ___ no.

The district court informed counsel that it would question individual jurors more specifically about the matter if the juror's answer to that question was affirmative. Otherwise, the court refused to ask the jury pool more specific questions pertaining to the Mafia.

While we are aware that the district court has broad discretion in such matters, we are mindful that this case attracted much media attention. This court has indicated that the district court is in the best position to determine the appropriate areas of inquiry in such cases.

> Wide discretion [is] granted to the trial court in conducting voir dire in the area of pretrial publicity and in other areas of inquiry that might tend to show juror bias. Particularly with respect to pretrial publicity, we think this primary reliance on the judgment of the trial court makes good sense. The judge of that court sits in the locale where the publicity is said to have had its effect, and brings to his evaluation of any such claim his own

> perception of the depth and extent of news stories that might influence a juror.

Lanier, 33 F.3d at 657 (citing *Mu'Min v. Virginia*, 500 U.S. 415, 427, 114 L. Ed. 2d 493, 111 S. Ct. 1899 (1991)). The Supreme Court and this circuit have set out the principles involved in determining whether the failure to ask specific questions amounts to "an unconstitutional abuse of discretion":

> There is no constitutional presumption of juror bias for or against members of any particular racial or ethnic groups. . . . There is no per se constitutional rule in such circumstances requiring inquiry as to racial prejudice. . . . Only when there are more substantial indications of the likelihood of racial or ethnic prejudice affecting the jurors in a particular case does the trial court's denial of a defendant's request to examine the jurors' ability to deal impartially with this subject amount to an unconstitutional abuse of discretion.

Rosales-Lopez v. United States, 451 U.S. 182, 190, 68 L. Ed. 2d 22, 101 S. Ct. 1629 (1981) (citations omitted).

> It is not required, however, that the jurors be totally ignorant of the facts and issues involved. In these days of swift, widespread and diverse methods of communication, an important case can be expected to arouse the interest of the public in the vicinity, and

> scarcely any of those best qualified to serve as jurors will not have formed some impression or opinion as to the merits of the case.

United States v. Blanton, 719 F.2d 815, 830 (6th Cir. 1983). It suffices "if the juror can lay aside his impression or opinion and render a verdict based on the evidence presented in court." *Murphy v. Florida*, 421 U.S. 794, 800, 44 L. Ed. 2d 589, 95 S. Ct. 2031 (1975) (quoting *Irvin v. Dowd,* 366 U.S. 717, 723, 6 L. Ed. 2d 751, 81 S. Ct. 1639 (1961)). *See also Hill v. Brigano*, 199 F.3d 833, 1999 U.S. App. LEXIS 33422, 1999 WL 1222642, at *8-*9 (6th Cir. 1999).

Having said all that, we still believe the district court would have been well-advised to allow more detailed questioning to reveal an individual prospective juror's prejudice, if any, against Cosa Nostra and the obvious Italian heritage of the defendants and the Sicilian or Italian connection with the Mafia. We decided similar issues concerning voir dire method and jury selection in a highly publicized case, *United States v. Blanton*, 719 F.2d 815 (6th Cir. 1983) (en banc). The court majority, in considering challenges to the sufficiency of voir dire in the criminal trial of a recent Tennessee governor, concluded that no reversible error occurred, although the trial judge probably did not employ the best voir dire procedures and we would not recommend the manner of such voir dire. *See id.* at 819, 822. We have the same reservations, as did the court majority in *Blanton* (and the writer was one of those judges), about voir dire and jury selection in this case.

Nevertheless, the district court sought to ensure the fairness of the jury selection through more general,

progressive questioning. After obtaining the prospective jurors' answers to the "Mafia" question in the questionnaire, the court followed up with each juror individually and asked more specific questions about their knowledge of the case. Of the twelve jurors that ultimately were chosen to sit at trial, seven had heard nothing about the case, and the other five had only had minimal knowledge. The five that had minimal knowledge of the case individually assured the district court that they could, despite that knowledge, render a fair and impartial verdict. Furthermore, the jurors all informed the court of their ability to assume that an accused is innocent until proven guilty beyond a reasonable doubt, and to accept that a defendant does not forfeit his presumption of innocence if he chooses not to testify. In our view, Tocco was not constitutionally entitled, under the circumstances, to any more specific race-based questioning during voir dire. "The Constitution, after all, does not dictate a catechism for voir dire, but only that the defendant be afforded an impartial jury." *Morgan v. Illinois*, 504 U.S. 719, 729, 119 L. Ed. 2d 492, 112 S. Ct. 2222 (1992).[3]

This issue regarding voir dire is of serious concern to this court. We believe that the district court's failure to ask more specific questions regarding Mafia or Italian-American prejudice was a mistake, but not an error compelling reversal under the circumstances. The district court's voir dire sufficiently explored the prospective jurors' knowledge about the Mafia-related case and their individual ability to be fair and impartial. As the Supreme Court has stated, "there is no

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[3] The fact that the jurors found defendant Tocco not guilty on ten counts, and that they acquitted other defendants in part or entirely, is some indication of the jury's ability to act with impartiality.

constitutional presumption of juror bias for or against members of any particular racial or ethnic groups." *Rosales-Lopez*, 451 U.S. at 190. Based on the foregoing, we believe the procedures for jury selection, viewed in their entirety, afforded Tocco a fair and impartial jury. Accordingly, we find that any error committed in failing to allow more specific voir dire questions on Mafia prejudice does not require a reversal of Tocco's conviction.[4]

C. Severance

Tocco also argues that the district court erred in failing to sever his trial from that of co-defendants Nove Tocco ("Nove") and Paul Corrado ("Corrado"). A district court's decision to deny severance of defendants is reviewed for a "clear abuse of discretion." *United States v. Critton*, 43 F.3d 1089, 1098 (6th Cir. 1995). The defendant "has a heavy burden of showing specific and compelling prejudice" from having a joint trial. *United States v. Harris*, 9 F.3d 493, 500 (6th Cir. 1993).

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[4] Much of Tocco's pretrial argument focused on the stigma attached to the words "Cosa Nostra" and "Mafia" as those terms were used in the indictment charges. The charges in this case, however, would not differ materially from a charge that a particular defendant was allegedly in a particular group or gang, such as "Hell's Angels," or "White Citizen Council," or a subversive group such as an international terrorist organization. We would not deem such an indictment charge to constitute prejudicial error so long as the prosecution was prepared to come forward with proof to establish the existence of such a group, and that the particular defendant was associated with the alleged criminal enterprise or conspiracy.

Tocco claims that his trial should have been severed from that of Nove and Corrado because there was no evidence that he was a co-conspirator of those two defendants. He argues that certain tape recorded statements of Nove and Corrado were entered into evidence, and that such evidence never linked him with those defendants. Thus, he claims that the evidence unfairly prejudiced his case, and he should have been given a separate trial.

We find that Tocco's position is an extension of his argument that the evidence was insufficient to find that a conspiracy existed between him and the other defendants. For reasons discussed below, we find that the evidence was sufficient to support a finding that such a conspiracy existed. Joint trials are favored in this circuit, and "it is well-settled that defendants are not entitled to severance merely because they may have a better chance of acquittal in separate trials." *Zafiro v. United States*, 506 U.S. 534, 540, 122 L. Ed. 2d 317, 113 S. Ct. 933 (1993). We must presume that juries are "capable of sorting out the evidence and considering the case of each defendant separately." *Harris*, 9 F.3d at 501. The fact that the jurors in this case found Tocco not guilty on ten counts and acquitted co-defendants on other counts is some indication that the jury was able to sort out the issues and follow the court's instructions with respect to each defendant separately.[5] Accordingly, we find that the district court did

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[5] Tocco cites *United States v. Casamento*, 887 F.2d 1141, 1152 (2d Cir. 1989), in arguing that "megatrials" should not be permitted and that there should be a presumption against a joint trial in cases that are estimated to last more than four months. This circuit, however, has not adopted such a policy, and we decline to do so in this case. We adhere to the "strong policy in favor of joint trials

not abuse its discretion in failing to sever Tocco's trial from that of Nove and Corrado.

D. Admissibility of Evidence

Tocco raises seven alleged errors regarding the district court's admission of evidence. Generally, a district court's decision to admit testimony and other evidence is reviewable under an abuse of discretion standard. *United States v. Bonds*, 12 F.3d 540, 554 (6th Cir. 1993). Even if the district court abuses its discretion in this regard, we will not reverse a conviction on that basis unless the "substantial rights" of a party are affected. *Id.* We will note below the issues to which a different standard of review applies.

(1) Testimony of Anthony Polizzi

An important part of the government's case against Tocco was the testimony of Angelo Polizzi ("Angelo"). Angelo testified about statements made to him by his father, Michael Polizzi ("Polizzi"), who died shortly before trial in this case, which the district court held to be admissible as declarations against penal interest. *See* Fed R. Evid.

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when charges will be proved by the same series of acts." *United States v. Horton*, 847 F.2d 313, 317 (6th Cir. 1988); *see also United States v. Mays*, 69 F.3d 116, 120 (6th Cir. 1995) (recognizing the "strong policy in favoring joint trials" and "the presumption of the validity of curative instructions").

804(b)(3).[6] Tocco now argues that the district court erred in allowing Angelo to testify about his father's statements. We review de novo the issue of whether the district court properly held those statements to be admissible. *See United States v. Fountain*, 2 F.3d 656, 668 (6th Cir. 1993).

The statements challenged by Tocco are in one of two categories: (1) statements that others were involved in the conspiracies and (2) statements about Polizzi's own involvement in the Frontier Hotel and Casino, which were made after Polizzi had been convicted and sentenced based on that involvement.

Without directing the court's attention to specific statements, Tocco claims that "while a statement of [Angelo] Polizzi's father that he, himself, was involved in organized crime may have been a declaration against his father's penal interest, the statements that others were involved in illegal

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[6] Federal Rule of Evidence 804(b)(3) provides in pertinent part:

> (b) **Hearsay exceptions.** The following are not excluded by the hearsay rule if the declarant is unavailable as a witness:
>
> . . .
>
> (3) **Statement against interest.** A statement which at the time of its making so far contrary to the declarant's pecuniary or proprietary interest, or so far tended to subject the declarant to civil or criminal liability . . . that a reasonable person in the declarant's position would not have made the statement unless believing it to be true.

crime were not declarations against his father's penal interest." In support, Tocco relies on *Williamson v. United States*, 512 U.S. 594, 129 L. Ed. 2d 476, 114 S. Ct. 2431 (1994), in which the Supreme Court held that the declarations of a criminal that implicate another person are admissible only to the extent that they are self-inculpatory. *Williamson*, 512 U.S. at 599. In determining whether Polizzi's statements qualify as declarations against penal interest, we must consider (1) whether the declarant is unavailable; (2) whether, from the perspective of the average, reasonable person, the statements were truly adverse to the declarant's penal interest, and (3) whether corroborating circumstances truly establish the trustworthiness of the statement. *United States v. Maliszewski*, 161 F.3d 992, 1009 (6th Cir. 1998), cert. denied, 525 U.S. 1184, 143 L. Ed. 2d 120, 119 S. Ct. 1126 (1999).

Among other things, Polizzi told Angelo about Tocco's role in the Cosa Nostra organization, and about the identity of other organization leaders. Polizzi stated that Tocco had been the leader since 1979, and that defendant Zerilli was the leader before him. All were related by blood or marriage. Polizzi had identified Paul Corrado and Nove Tocco as underlings in the enterprise. Angelo at the time himself assumed a role in the conspiracy by making deliveries and collections for his father.

Tocco argues that Polizzi's statements implicating others were inadmissible because they were about others and were not adverse to Polizzi's own penal interest. We agree that our decision should be guided by *Williamson*. In that case, the Supreme Court recognized that "the question under Rule 804(b)(3) is always whether the statement was

sufficiently against the declarant's penal interest 'that a reasonable person in the declarant's position would not have made the statement unless believing it to be true,' and this question can only be answered in light of the surrounding circumstances." *Williamson*, 512 U.S. at 603-04. The court also noted that statements must be viewed in context. For example:

> "Sam and I went to Joe's house" might be against the declarant's interest if a reasonable person in the declarant's shoes would realize that being linked to Joe and Sam would implicate the declarant in Joe and Sam's conspiracy. And other statements that give the police significant details about the crime may also, depending on the situation, be against the declarant's interest.

Id. at 603; *see also United States v. Price*, 134 F.3d 340, 347 (6th Cir.), cert. denied, 525 U.S. 845, 142 L. Ed. 2d 91, 119 S. Ct. 114 (1998).

We believe that Tocco's argument ignores the context in which Polizzi's statements were made to his son. The statements described Polizzi's own participation in the RICO enterprise, and inculpated himself and others as participants in the conspiracy. Those statements are not rendered inadmissible simply because they implicate others. Justice Scalia explained a similar situation in his concurring opinion in *Williamson*:

> For example, if a lieutenant in an organized crime operation described the inner workings

> of an extortion and protection racket, naming some of the other actors and thereby inculpating himself on racketeering and/or conspiracy charges, I have no doubt that some of those remarks could be admitted as statements against penal interest.

512 U.S. at 606-07 (Scalia, J., concurring). Here, Polizzi's statements about the conspiracy linked himself to the others in the conspiracy, and were therefore against his own penal interest. Thus, we decline to hold that those statements were rendered inadmissible by virtue of the fact that others were implicated.[7] *See United States v. Barone*, 114 F.3d 1284, 1295 (1st Cir. 1997) (finding admissible statements that "demonstrate 'an insider's knowledge' of a criminal enterprise and its criminal activities").

Tocco also claims that any statements about Polizzi's involvement in the Frontier Hotel and Casino case were not against his penal interest because he had been convicted and sentenced for that conduct at the time he made the statements. In other words, Polizzi was already in prison, so no penal interest was at stake. We disagree, because Polizzi's involvement in the Frontier Hotel and Casino was a predicate act of the RICO conspiracy charged in this case, a conspiracy

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[7] When Polizzi made the statements about involvement in organized crime in Detroit and about Cosa Nostra, the statements were not made with the hope of implicating others to gain favor with the police. Under the circumstances, we believe that other corroborating factors also support admissibility of the Polizzi testimony. *See Price*, 134 F.3d at 348 (discussing what types of corroborating evidence demonstrate trustworthiness).

of which Polizzi was a member and for which he was never tried and convicted.

Tocco did not raise an argument that the admission of Polizzi's statements violated his Sixth Amendment right to confront witnesses testifying against him. *See Lilly v. Virginia*, 527 U.S. 116, 119 S. Ct. 1887, 1899, 144 L. Ed. 2d 117 (1999). Even if we had, the argument would have been unavailing. In *Lilly*, the Supreme Court concluded that an accomplice's out-of-court statements that inculpate a defendant cannot be admitted against that defendant unless they bear "particularized guarantees of trustworthiness." 119 S. Ct. at 1899-1900. Those guarantees must be inherent in the circumstances of the testimony itself; the fact that other evidence corroborates the testimony in question does not suffice. *Id.* at 1900. We find that the circumstances surrounding Polizzi's statements in this case indicate that the statements were trustworthy, particularly in light of the fact that Polizzi's statements were made to his son in confidence, rather than to the police or to any other authority for the purpose of shifting the blame to Tocco. *See Bruton v. Phillips*, 64 F. Supp. 2d 669, 680 (E.D. Mich. 1999) (reasoning that statements made to a perceived ally rather than to police officers during an interrogation are trustworthy, citing *Latine v. Mann*, 25 F.3d 1162, 1166-67 (2d Cir. 1994)). Therefore, the admission of Polizzi's statements would withstand a Sixth Amendment challenge.

Accordingly, we reject Tocco's argument that the district court erred in allowing into evidence Polizzi's out-of-court statements.

(2) Documentary evidence relating to Polizzi

We review the admission of exhibits under an abuse of discretion standard. *Bonds*, 12 F.3d at 554. The government argues that it sought to introduce Angelo Polizzi's plea agreement and other exhibits relating to this witness "to blunt any cross-examination impeaching of Polizzi's credibility" with respect to cooperating with the prosecution. The plea agreement provided, among other things, that Angelo Polizzi would "provide truthful and complete information." Tocco maintains that introduction of this evidence impermissibly constituted a vouching for Polizzi's credibility, particularly since he was a key witness for the prosecution. We have considered this question previously and have concluded that "introduction of the entire plea agreement permits the jury to consider fully the possible conflicting motivations underlying the witness' testimony." *United States v. Townsend*, 796 F.2d 158, 163 (6th Cir. 1986). We noted further:

> While the existence of a plea agreement may support the witness' credibility by showing his or her interest in testifying truthfully, the plea agreement may also impeach the witness' credibility by showing his or her interest in testifying as the government wishes regardless of the truth.

Id.; accord, *United States v. Mealy*, 851 F.2d 890, 898-99 (7th Cir. 1988) (holding that prosecutor may elicit testimony regarding plea agreement and may enter agreement into evidence).

Tocco counters with reliance upon *United States v. Carroll*, 26 F.3d 1380 (6th Cir. 1994), which held that the prosecutor's improper reliance in closing argument on such an agreement amounted to personal vouching for the truthfulness of the witness' testimony under the circumstances. The prosecutor argued and emphasized in *Carroll* that the witness who had entered into a similar plea agreement "would be in jeopardy" if he were not testifying truthfully. *Id.* at 1389. Circumstances were not the same in this case; the prosecutor made no similar closing argument and did not personally vouch for the truthfulness of Polizzi's testimony. We do not agree with Tocco that *Carroll* supports reversal by reason of the introduction of the plea agreement as an exhibit. Indeed, the prosecutor may refer to such agreement in appropriate circumstances to deflect defendant's use of a plea agreement to attack the witness' credibility. *See Mealy*, 851 F.2d at 898-99. Thus, we find no error in the admission of these exhibits, and this assignment of error, therefore, does not support a reversal of Tocco's conviction.

(3) Vitello's testimony about labor racketeering

The district court permitted Vitello to testify about Vito Giacolone's taking care of labor problems in Toledo. Tocco claims that allowing the "labor racketeering" testimony impermissibly "enlarged the scope of the indictment" and strayed away "from the elements of the charges." We are hard pressed to see any unfair prejudice inherent in this brief testimony. We agree with the district court that the evidence related to the charged conspiracy. Tocco requested no limiting instruction, and we cannot conclude that the district court's decision constituted reversible error.

(4) Investigative reports by the Nevada Gaming Commission

Through Clifton Copher, chief of the enforcement division of the Nevada State Gaming Control Board, the government introduced records of the Board, also called "investigative summaries," into evidence.[8] The government claims that these documents pertained to the application for a gaming license for the Edgewater Casino and corroborated and placed into context the conversations of co-conspirators that had been intercepted. Also, the records were relevant to the defendants obtaining a hidden interest in the Nevada gambling industry.

Tocco objected to the admission of the documents on the basis that they contained opinions and were speculative. The district court overruled that objection, finding that the documents were admissible as business records. After the witness was dismissed, the district court granted Tocco's request to redact certain portions of the reports. Six weeks later, the parties placed into the record an agreed-upon redaction of only one of the reports.

In this appeal, Tocco claims that the district court erred in admitting the Board's records into evidence. Upon examination, we agree with the government that much of the documentary evidence was not hearsay because it was based on facts that the Board had received from information supplied by the applicants. The objectionable portions which

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[8] *See Kraft v. Jacka*, 872 F.2d 862, 867-68 (9th Cir. 1989), which sets out the Nevada regulatory procedures and controls involved.

might arguably be hearsay were redacted by agreement of the parties. Furthermore, the exhibits were admissible for a non-hearsay purpose--they showed the predicate act of the defendants obtaining a hidden interest in the Edgewater, and they assisted in showing why the Gaming Board granted the applicants only a temporary gaming license. Thus, we are not persuaded that the district court should have excluded these documents as inadmissible hearsay, and in view of the court's action in allowing redactions to particular objectionable portions, no error in this regard has been established.

(5) Judgments of conviction

At trial, the district court allowed the government to admit into evidence the certified convictions against certain of Tocco's co-defendants. Tocco generally objected to the admission of that evidence, but at no time did he specifically complain that this was an improper use of offensive collateral estoppel. Because we find that the admission of those convictions was permissible, we will assume for purposes of our analysis that the issue was properly preserved for review.

Tocco argues that the government is not permitted to rely on the judgments of conviction to prove the predicate acts of a RICO charge. Such use of those convictions, he claims, constitutes improper offensive collateral estoppel, relying on the reasoning in *United States v. Pelullo*, 14 F.3d 881 (3d Cir. 1994). In *Pellulo*, however, the district court held that the previous conviction of the defendant established the existence of a predicate act under RICO, and the court instructed the jury to recognize the predicate act as a matter of law. *See Pellulo*, 14 F.3d at 889-90. The instant case is different, because the district court here entered into evidence

the convictions of Tocco's co-defendants, who had the opportunity to show the jury that he was not involved in their crimes. Furthermore, the court did not give a "collateral estoppel" instruction as the court did in *Pellulo*. The government explained that "whether or not Mr. Tocco was connected to that is a jury-question for the jury to determine." Also, there was other evidence that corroborated the information about the convictions in question. Thus, because no collateral estoppel effect was given to the challenged evidence, Tocco's argument is unfounded.

(6) FBI Agent Ruffino as an expert witness

The district court allowed one of the case agents, Samuel J. Ruffino, to testify as an expert on organized crime. Tocco claims that allowing that testimony constituted error because he received insufficient pretrial notice that Ruffino would be testifying in that capacity, and because Ruffino should not have been permitted to testify both as a fact witness and an expert witness. We review the district court's admission of expert testimony under an abuse of discretion standard. *Kumho Tire Co. v. Carmichael*, 526 U.S. 137, 119 S. Ct. 1167, 1174-75, 143 L. Ed. 2d 238 (1999).

After the jury had been selected but before the trial began, the government moved to have Alfonso D'Arco qualified as an expert to testify about the nature, organization, rules, and structure of the national Cosa Nostra enterprise. Though the district court initially agreed to allow that testimony, it reversed itself two days later with the agreement that it would consider a renewed motion later in the trial. On March 2, 1998, the government renewed its motion to qualify D'Arco, and it also informed the court of its intent to call

Ruffino if D'Arco was not allowed to testify. About ten days later, more than a month before he testified, the government formally notified the court and all the defendants that it intended to call Ruffino as its expert on "the structure, the organization, the rules, the interpretation of phrases, and jargon that's been used in [the] trial, on the tapes, the hierarchy and the roles of individuals." Thus, Tocco knew before trial that some form of "organized crime" expert would testify, and he knew one month before the actual testimony that Ruffino would be the expert. Tocco did not request a continuance, nor did he claim that he did not have sufficient time to examine the witness prior to his testimony. We conclude that, under these circumstances, this notice concerning Ruffino was adequate and sufficient.

Tocco also claims that the district court erred in admitting Ruffino's testimony as an expert witness because of the undue prejudice involved in Ruffino testifying as both a fact witness and an expert witness. We rejected a similar argument in *United States v. Thomas*, 74 F.3d 676 (6th Cir. 1996), where the defendant argued that a police officer should not be able to testify in a single case as both a fact witness and an expert witness. We noted that although "there is a significant risk that the jury will be confused by the officer's dual role," we are not willing to adopt a per se prohibition of the practice of allowing an officer to testify in two capacities. *Thomas*, 74 F.3d at 682-83. If the district court and the prosecutor take care to assure that the jury is informed of the dual roles of a law enforcement officer as a fact witness and an expert witness, then the officer's "expert" testimony may be proper. *See id.* at 683.

In this case, Ruffino's dual roles were emphasized to the jury by the fact that he testified at two different times - once early in the trial as a fact witness, and again at the conclusion of trial as an expert witness. Furthermore, the district court instructed the jury, both before he gave his opinion and again in the jury charge, that it should consider Ruffino's dual roles in determining what weight, if any, to give Ruffino's expert testimony. Under these circumstances, the district court did not abuse its discretion in allowing Ruffino to testify in both capacities.

Ruffino's testimony was certainly relevant and reliable under the principles of *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 125 L. Ed. 2d 469, 113 S. Ct. 2786 (1993). This type of evidence regarding the inner-workings of organized crime has been held to be a proper subject of expert opinion because such matters are "generally beyond the understanding of the average layman." *Thomas*, 74 F.3d at 682; *see also United States v. Amuso*, 21 F.3d 1251, 1264 (2d Cir. 1994); *United States v. Locascio*, 6 F.3d 924, 936-37 (2d Cir. 1993); *United States v. Pungitore*, 910 F.2d 1084, 1148-49 (3d Cir. 1990). Further, to the extent that Tocco challenges Ruffino's qualifications on the subject about which he testified, we reject any such contention in light of the undisputed facts. Ruffino has extensive experience in the investigation of organized crime in the Detroit area, including 22 years with the FBI, 17 of which were spent in organized crime investigations, and his role since 1990 as the Cosa Nostra coordinator for the Detroit division, and as liason with other FBI offices and FBI headquarters. Thus, he was amply qualified to opine about the machinations of organized crime.

In summary, we conclude that the district court did not abuse its discretion in allowing agent Ruffino to testify as an expert and that his testimony met the standards of relevance and reliability. Furthermore, the dual role played by Ruffino as both a fact witness and an expert did not, under the circumstances, preclude his testimony because the transition from one role to another was separated by time and was explained to the jury.

(7) Co-conspirator statements

Tocco contends that the district court erroneously admitted tapes (wire intercepts) of conversations between Nove Tocco and Paul Corrado because they were not "in furtherance of the conspiracy" charged. Rather, Tocco claims, those tapes contained nothing more than idle, malicious gossip and inflammatory statements which unduly prejudiced his case.

If the conversations admitted were "nothing more than idle chatter or casual conversation about past events," they were not properly admissible. *United States v. Shores*, 33 F.3d 438, 444 (4th Cir. 1994); *see also United States v. Doerr*, 886 F.2d 944, 951-52 (7th Cir. 1989). The court in *Doerr* acknowledged that "statements 'in furtherance' of a conspiracy can take many forms," such as keeping co-conspirators advised, or concealing aspects of the scheme. *Id.* at 951. The statement may also be "susceptible of alternative interpretations." *Id.* at 952; *see also Shores*, 33 F.3d at 444. *Shores* goes further to indicate that a statement may be admissible as "in furtherance of a conspiracy" even if "not 'exclusively, or even primarily, made to further the conspiracy.'" *Id.* (quoting *United States v. Shoffner*, 826 F.2d

619, 628 (7th Cir. 1987)); *see also United States v. Hitow*, 889 F.2d 1573, 1581 (6th Cir. 1989); *United States v. Hamilton*, 689 F.2d 1262, 1270 (6th Cir. 1982).

We are satisfied, after examining the record, that the great bulk of the admitted evidence tended to demonstrate (1) that the conspiracy in question existed; (2) that those whose statements were overheard were members of the conspiracy that included Tocco; and (3) that the statements were, in fact, made "during the course and in furtherance of the conspiracy at issue" according to Fed. R. Evid. 801(d)(2)(E). The provision applies when "a court is satisfied that the statement actually falls within the definition of the rule." *Bourjaily v. United States*, 483 U.S. 171, 175, 97 L. Ed. 2d 144, 107 S. Ct. 2775 (1987). "The existence of the conspiracy and [defendant's] involvement in it are preliminary questions of fact that under [Fed. R. Evid.] 104, must be resolved by the court." *Id.*

Bourjaily held also in considering this issue "that there is little doubt that a co-conspirator's statements could themselves be probative of the existence of a conspiracy." *Id.* at 180. Here, Nove Tocco's and Paul Corrado's conversations are probative of the existence of a conspiracy in which defendant Tocco was involved, and other evidence was probative on this matter as well. It was not error to consider that the controverted statements were made in the course and scope of the conspiracy.

We are concerned, however, with certain remarks of a racial nature that were made in the conversations that should have been excised from the tapes. For example, one of the comments on the tapes was that "I think you might win up

here [in Detroit] with a nigger trial, nigger jury." Also, a statement was made that "they seem to have success over there [in New York City] because there's so many Italians and American people, the Wasps or whatever, are so used to being around other Italians, they're accepted."

Although we agree that those particular denigrating comments were unfairly prejudicial, they were only a very minor portion of the total discussion on the tapes. Accordingly, the district court did not commit reversible error in refusing to strike the tapes in total as urged by defendant Tocco, though it would have been advisable to strike the parts that we have mentioned. We note that a case relied upon by Tocco, *United States v. Johnson*, 927 F.2d 999 (7th Cir. 1991), found that certain co-conspirator statements were improperly admitted against defendant, but that the error did not affect the "substantial rights" of the defendant and was therefore not reversible. *Johnson*, 927 F.2d at 1003. Here, as in *Johnson*, the prosecution presented substantial other evidence "from which the jury might have concluded" defendant's guilt, and his conviction will not be reversed based on the admission of the co-conspirator's statements. *Id.*

In sum, none of the evidentiary issues raised by Tocco require this court to reverse his conviction.

E. Prosecutorial Misconduct

Tocco moved for a mistrial based upon several aspects of alleged prosecutorial misconduct, and the district court denied that motion. We review the district court's decision for an abuse of discretion. *United States v. Carroll*, 26 F.3d 1380, 1383 (6th Cir. 1994). "An abuse of discretion exists

when the reviewing court is firmly convinced that a mistake has been made." *Id.*

> When reviewing claims of prosecutorial misconduct, we determine first whether the statements were improper. *See United States v. Krebs*, 788 F.2d 1166, 1177 (6th Cir.1986). If they appear improper, we then look to see if they were flagrant and warrant reversal. *See United States v. Carroll*, 26 F.3d 1380, 1388 (6th Cir. 1994). To determine flagrancy, the standard set by this Court is: 1) whether the statements tended to mislead the jury or prejudice the defendant; 2) whether the statements were isolated or among a series of improper statements; 3) whether the statements were deliberately or accidentally before the jury; and 4) the total strength of the evidence against the accused. *United States v. Monus*, 128 F.3d 376, 394 (6th Cir.1997) (citing *United States v. Cobleigh*, 75 F.3d 242, 247 (6th Cir. 1996)); *Carroll*, 26 F.3d at 1385 (citing *United States v. Leon*, 534 F.2d 667, 679 (6th Cir.1976)). To reverse a conviction because of an improper non-flagrant statement, a reviewing court must determine that: 1) the proof of the defendant's guilt is not overwhelming; 2) the defense counsel objected; and 3) the trial court failed to cure the impropriety by failing to admonish the jury. *Monus*, 128 F.3d at 394; *Carroll*, 26 F.3d at 1385-86 (citing *United States v. Bess*, 593 F.2d 749, 757 (6th Cir.1979)).

United States v. Francis, 170 F.3d 546, 549-50 (6th Cir. 1999); *see also Pritchett v. Pitcher*, 117 F.3d 959, 964 (6th Cir. 1997) (quoting *Serra v. Michigan Dept. of Corrections*, 4 F.3d 1348, 1355-56 (6th Cir. 1993)). We will not overturn a verdict unless the prosecutorial misconduct is "so pronounced and persistent that it permeated the entire atmosphere of the trial, . . . or so gross as probably to prejudice the defendant." *Pritchett*, 117 F.3d at 964 (citations omitted).

Tocco raises seven categories of government misconduct that, taken together, allegedly require reversal. For the following reasons, we are not "firmly convinced that a mistake has been made," nor are we persuaded that there has been a denial of a fair trial by the actions of the prosecutor. *See Carroll*, 26 F.3d at 1383.

We turn to the specifics of the alleged misconduct.

(1) Blurt-outs

Tocco claims that the prosecution improperly orchestrated questions and answers that intentionally brought before the jury opinions of experienced FBI agents that Tocco and others were "known members of the Cosa Nostra family." Tocco promptly objected to such "blurt-outs" at trial, and the district court forcefully sustained those objections and admonished counsel in that respect.

At the end of the first day of trial, the court expressed its preference that the terms "La Cosa Nostra" or "Mafia" not be used unless the defendants' participation in that group was first established. The court further stated that "it's not going

to be any kind of a terminal problem if [the improper terminology] slips out." Later in the trial, when government agent Stejskal was asked why he was engaged in a surveillance of Tocco, he said because "Jack Tocco was considered to be a member of the Detroit family of La Cosa Nostra." Tocco did not object at that time, but he objected when Stejskal subsequently stated that Raffaele Qusarano was a member of the Detroit family. The district court sustained the objection, then later warned that there should be no "more conclusory testimony about we knew that these men were such and such." When Tocco moved for a mistrial on the basis of the improper comments, the district court denied the motion and explained that it had effectively sustained any objections in that regard and that a new trial was not warranted. Tocco did not request any curative instruction on the issue.

We agree, as the district court recognized, that any testimony that Tocco was a "known" member or "boss" of La Cosa Nostra was improper. The impropriety, however, was not flagrant, nor was it so pervasive as to "permeate the entire atmosphere of the trial." Rather, when Tocco objected to the improper remarks, the district court promptly sustained any objections and the government complied with the court's admonishments. Furthermore, the government was charged with proving its allegation that Tocco was a member of La Cosa Nostra, so every reference to the group can not be deemed to have been improper. The improper witness comments constituted a very small part of the total evidence against Tocco. The district court did not decline any precautionary instructions suggested by Tocco.

In conclusion, we deem Tocco's concerns to be legitimate, but, on balance, we find that the district court did not abuse its discretion in failing to grant a new trial based on the improper episodes. *See United States v. Forrest*, 17 F.3d 916, 920-21 (6th Cir. 1994) (holding that the challenge was legitimate, but finding that the episodes did not warrant a mistrial).

(2) "Vouching" for the credibility of Angelo Polizzi

Tocco claims that the government improperly "vouched" for the credibility of Angelo Polizzi by entering into evidence Polizzi's plea agreement and related documents which stated that he had to testify truthfully in order to obtain lenity. Whether improper vouching amounts to prosecutorial misconduct and whether it renders the trial fundamentally unfair are mixed questions of law and fact reviewable de novo. *Francis*, 170 F.3d at 549.

Tocco argues that this situation is like that described in *Carroll, supra*, where this court held that the government may not "vouch" for the credibility of its witnesses by disclosing to the jury the witness's obligation under his plea agreement or by prosecutor comments suggesting that a witness will be punished by not testifying truthfully. Such a practice, we found, "improperly places the prestige of the government, and even of the court, behind the credibility of the [witnesses] by stating that, if the government or the judge did not believe that the witnesses were being truthful, the witnesses would be in jeopardy. . . . This constitutes improper vouching. . . . We cannot overstate the extent to

which we disapprove of this sort of improper vouching by prosecutors." *Carroll*, 26 F.3d at 1389.

In this case, the government introduced into evidence documents related to the benefits that Angelo received for his cooperation with the government. Those documents were redacted to exclude the phrase that Angelo "provided truthful and very valuable testimony." In his examination of Angelo, the prosecutor never referred to the parts of the documents that explained the benefits that were conferred in exchange for Angelo's testimony. Tocco fails to point out any comments made by the prosecutor to the effect that the government and the court would prosecute Polizzi for perjury and revoke his plea agreement if he did not testify truthfully. Nor did the prosecutor indicate that he had any other independent means of discerning Polizzi's truthfulness. Thus, the only basis for Tocco's claim is the unredacted portions of Polizzi's plea agreement and related documents, the admissibility of which we have discussed and affirmed above. There being no improper prosecutorial statements, we must reject Tocco's contention of improper vouching. *See Francis*, 170 F.3d at 549-50 (reasoning that court must first determine whether the prosecutor's statements are improper).

(3) Impermissible comments on the exercise of Tocco's right to seek counsel

Tocco claims that prosecutorial misconduct occurred when the prosecution elicited testimony during trial from various witnesses indicating that Tocco had requested to see an attorney, that he had consulted an attorney, and that he consulted an attorney in the company of co-conspirators.

This, Tocco argues, constituted "an impermissible comment on the defendant's exercise of his constitutional right."

We find this argument to be without merit. First, it seems that Tocco did not object to most of this evidence at the time it was admitted. Rather, counsel for Anthony Tocco objected to the possible prejudice of surveillance evidence that Tocco went to Peter Bellanca's law offices. He feared that such evidence would prejudice his client, Anthony Tocco. The district court rejected that argument because the evidence tended to show Tocco's association with an illegal casino matter. It was not offered for any improper purpose. Assuming that Anthony's objection preserves the issue for Tocco in this appeal, we find that the evidence of Tocco's visit to Bellanca's law office -- or evidence that Tocco sought out or consulted the advice of an attorney generally -- simply does not invade the attorney-client relationship, nor does such evidence impinge on the exercise of Tocco's constitutional right to consult with an attorney. The mere act of hiring an attorney is simply not probative of Tocco's guilt or innocence under these circumstances.

(4) Admitting evidence of an unrelated murder

Tocco argues that prosecutorial misconduct occurred when the government introduced evidence that the cousin of the bookmaker Yatooma was murdered. The government claims that it had offered that evidence to explain when and why Yatooma's bookmaking business suddenly increased sharply. Yatooma testified that his cousin's bookmaking customers started dealing with him after his cousin died. Tocco did not object to that evidence. When asked in cross-examination whether the defendants were involved in the

murder, Yatooma responded, "Oh, no, sir, no." Though the court gave an instruction for the jury to disregard such testimony, Tocco now claims that the prejudice from that evidence was too prejudicial for a curative instruction to mitigate.

We disagree. The prosecution did not imply that the murder was related to defendant Tocco, and the evidence did not by its own nature imply such a conclusion. The witness specifically denied that Tocco or any other defendant was involved, and the district court issued a curative instruction on the matter. Under these circumstances, we find no basis for concluding that there was prosecutorial misconduct.

(5) Arguing facts not in evidence

Tocco argues that the prosecution twice argued facts that were not in evidence during closing argument, in that the prosecuting attorney embellished the testimony of Silverio Vitello. The prosecutor first argued that after Vitello saw Tocco, Vitello's union problem was taken care of, and second that "Tocco worked that union problem out for [Vitello]." When Tocco objected to the second comment (he did not object to the first), the prosecutor explained that he was arguing his recollection of Vitello's testimony. Vitello actually testified that when he had problems Tocco referred him to Tony Lapiana, who had previously helped him handle union grievances.

We have examined this contention in light of the record and, again, find no justifiable basis for concluding that this episode amounted to prosecutorial misconduct. At most, as the district court apparently concluded, the prosecutor

argued a mistaken recollection of the facts and the jury was reminded that it was the determiner of the true facts from the evidence. Under the circumstances, Tocco is not entitled a new trial based on this assignment of error.

(6) Shuffling of documents in Exhibit 116

Tocco argues that the prosecutor added pages to Exhibit 116, a Nevada Gaming Commission record, after the exhibit had been entered into evidence. Tocco alleges that an egregious error was committed when the prosecutor was allowed to refer to the pages that had been added during his closing argument. He claimed that the prosecutor impermissibly "shuffled" the exhibit to include the investigative summaries that were not a part of the exhibit when it was admitted.

From our review of the record, it is apparent that the reference to the pertinent pages of Exhibit 116 did not constitute prosecutorial misconduct. Tocco has failed to show that the portions to which the prosecutor referred were not included in the exhibit during trial, and that reference to those portions prejudiced him in any way. The district court was in the best position to assay the merits of the parties' arguments and to determine exactly what was included in Exhibit 116 according to the redaction agreement of the parties. From this record, we are not persuaded that the prosecutor engaged in misconduct with respect to its reference to Exhibit 116.

(7) FBI escort of cooperating witness to witness stand/testifying about witness's fears

At trial, FBI agents escorted the first government witness, Angelo Polizzi, into the courtroom and all the way to the witness chair, which Tocco claims indicated to the jury that government witnesses were in danger from the defendants. Tocco objected, and the district court directed that there be no more escorting of witnesses to the stand. Tocco argues that the district court committed reversible error in failing to grant him a mistrial because of the FBI escort of Polizzi.

The agents that escorted Polizzi were in plain clothes and without weapons. There were no prosecutorial comments relating to the escort and the need for witness protection. Though witness endangerment could have possibly been inferred, the district court resolved the issue by disallowing such escorts for the other witnesses. We find no error, much less any "egregious" error, in the action taken by the district court and denial of the motion for mistrial based upon this alleged misconduct.

In sum, we find that none of the alleged instances of prosecutorial misconduct, alone or collectively, justify a new trial in this case.

F. Insufficiency of the Evidence

We review a challenge to the sufficiency of the evidence de novo, considering "whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements

of the crime beyond a reasonable doubt." *Jackson v. Virginia*, 443 U.S. 307, 319, 61 L. Ed. 2d 560, 99 S. Ct. 2781 (1979); *see also United States v. Jones*, 102 F.3d 804, 807-08 (6th Cir. 1996). A defendant making such a challenge bears a very heavy burden. *United States v. Spearman*, 186 F.3d 743, 746 (6th Cir. 1999), petition for cert. filed (U.S. Oct. 29, 1999) (No. 99-6812). "Circumstantial evidence alone is sufficient to sustain a conviction and such evidence need not remove every reasonable hypothesis except that of guilt." *Id.* (citation omitted). The jury may draw any reasonable inferences from direct, as well as circumstantial, proof. *See United States v. Locascio*, 6 F.3d 924, 944 (2d Cir. 1993). Once a conspiracy has been proven, only slight evidence is necessary to implicate a defendant as a participant in that conspiracy if the evidence shows the connection beyond a reasonable doubt. *See United States v. Braggs*, 23 F.3d 1047, 1051 (6th Cir. 1994).

At the conclusion of the government's proof, Tocco moved for acquittal "relying on the brief filed by co-defendant [Anthony Tocco]." We have not been furnished in the substantial joint appendix a copy of that motion, so we look to Tocco's appellate brief for his position with respect to this "heavy burden" of persuasion. In an opinion filed July 30, 1998, the district court simply concluded as to this defendant that "adequate evidence was adduced at trial to support the jury's verdict on all charges," and, therefore, denied Tocco's motion for acquittal and for a new trial. Here, Tocco again argues that the evidence was insufficient to convict him on all three counts of which he was found guilty.

Proof of a charge under § 1962(d) requires proof that the association or enterprise existed and that the named

defendants were associated with and agreed to participate in the conduct of its affairs, which affect interstate commerce, through a pattern of racketeering activity (Count One) or through the collection of an unlawful debt (Count Two). *See United States v. Turkette*, 452 U.S. 576, 583, 69 L. Ed. 2d 246, 101 S. Ct. 2524 (1981); *United States v. Qaoud*, 777 F.2d 1105, 1116 (6th Cir. 1985). These elements are separate and distinct. *Turkette*, 452 U.S. at 583. Evidence used to show the existence of the enterprise may also support the participation element. *Id.* The RICO statute defines an enterprise as "including any individual, partnership, corporation, association or other legal entity, and any union or group of individuals associated in fact although not a legal entity." 18 U.S.C. § 1961(4).

(1) Counts One and Two -- Proof of the Enterprise

Tocco first challenges the sufficiency of the evidence of an enterprise. The existence of an enterprise is shown "by evidence of an ongoing organization, formal or informal, and by evidence that the various associations function as a continuing unit." *Turkette*, 452 U.S. at 583. "Continuity of structure exists where there is an organizational pattern or system of authority that provides a mechanism for directing the group's affairs on a continuing, rather than ad hoc, basis." *United States v. Kragness*, 830 F.2d 842, 856 (6th Cir. 1987).

The government claims that it presented sufficient evidence to show the existence of an enterprise, which was the Detroit organized crime family called La Cosa Nostra. The majority of this proof, the government notes, came

through the testimony of Angelo Polizzi and Ruffino, and through the recorded conversations admitted at trial. The testimony showed a highly structured organization with Tocco as the boss. According to the testimony, there were ten to twelve partners, all associated by blood or by marriage, including Michael Polizzi and Anthony Corrado, and several lower-level members, including Paul Corrado and Nove Tocco.

Tocco argues that the evidence fails to show an ascertainable structure distinct from any structure inherent in the conduct of a pattern of racketeering activity. Tocco's position, however, ignores the testimony of Angelo Polizzi, who testified as to statements made by his father regarding his involvement in La Cosa Nostra and the expert testimony of Ruffino, who testified about the general structure of La Cosa Nostra and other details involved in organized crime. As the Eighth Circuit has recognized, "the command system of a Mafia family is an example of the type of structure" that is distinct from the pattern of racketeering activity. *See United States v. Flynn*, 852 F.2d 1045, 1052 (8th Cir. 1988) (quoting *United States v. Bledsoe*, 674 F.2d 647, 665 (8th Cir. 1982)). Thus, the government submitted sufficient evidence to show that an enterprise existed.[9]

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[9] Tocco briefly argues that the RICO conspiracy charges are barred by the five-year statute of limitations. However, "a RICO conspiracy offense is complete, thus commencing the running of the five-year statute of limitations, only when the purposes of the conspiracy have either been accomplished or abandoned." *United States v. Salerno*, 868 F.2d 524, 534 (2d Cir. 1989) (citing *United States v. Persico*, 832 F.2d 705, 713 (2d Cir. 1987)). Tocco has not persuaded us that the purposes of the conspiracy had been

(2) Count One -- Pattern of Racketeering

Tocco claims that the evidence did not show a pattern of racketeering. To show a pattern of racketeering activity conspiracy, a defendant need not personally agree to commit two predicate acts; rather, he need only "know about and agree[ ] to facilitate the scheme." *Salinas v. United States*, 522 U.S. 52, 66, 139 L. Ed. 2d 352, 118 S. Ct. 469 (1997). Further, a defendant need not know about every member and component of the enterprise; he need only know "the general nature of the enterprise and that the enterprise extends beyond his role." *United States v. Eufrasio*, 935 F.2d 553, 577 n.29 (3d Cir. 1991).

Tocco argues that the government failed in its burden of showing a pattern of racketeering with respect to himself because the evidence showed no more than a series of unrelated acts by people not acting in concert with each other, although many knew each other. Tocco argues that he had no knowledge of many of the acts committed by the others in the purported conspiracy.

The testimony at trial belies Tocco's assertions. Angelo Polizzi, if believed, provided evidence to show the criminal enterprise in operation, with Tocco as a "boss" thereof. The tapes of Corrado and Nove Tocco, if believed, supported allegations of family connections and relationships,

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accomplished more than five years before his continuing involvement was shown, nor has it been demonstrated that he abandoned the ongoing enterprise. Certainly, Tocco has not shown any affirmative withdrawal. *See United States v. Rogers*, 118 F.3d 466 (6th Cir. 1997).

and a pattern of criminal activity. In *Salinas, supra,* the Supreme Court stated that "there is no requirement of some overt act or specific act in the [RICO] statute before us. . . . [Section 1962] is even more comprehensive than the general conspiracy offense in § 371." 522 U.S. at 63. "So long as the purpose of the agreement is to facilitate commission of a crime, the actor need not agree 'to commit' the crime." *Id.* at 65 (quoting the American Law Institute, Model Penal Code, Tent. Draft No. 10, p. 117 (1960)).

We believe that there was sufficient evidence for a rational jury to find that defendant Tocco agreed to "facilitate . . . some of the acts leading to the substantive offenses" charged. *Id.* Indeed, Angelo Polizzi testified that Tocco was the boss of the organization. Even if the proof did not show that all the substantive offenses related to the RICO conspiracy actually occurred, "it is elementary that a conspiracy may exist and be punished whether or not the substantive crime ensues, for the conspiracy is a distinct evil, dangerous to the public, and so punishable in itself." *Id.* The testimony confirmed the general nature of the enterprise, and that Tocco knew that the enterprise extended beyond his role therein.

(3) Count Two -- Collection of an Unlawful Debt

Tocco argues that Count Two is duplicitous of Count One, because Count Two charges another RICO conspiracy which has as its object the collection of an unlawful debt. It is true that Count Two relies on the same enterprise as is involved in Count One, but the crime charged in Count Two is not part of the predicate acts in Count One. These counts

are not duplicitous, but they are related. In a collection of an unlawful debt conspiracy, the government need only show an agreement as to one act of collection, whereas a pattern of racketeering activity RICO conspiracy requires an agreement to commit at least two predicate acts. *See United States v. Oreto*, 37 F.3d 739, 751 (1st Cir. 1994); *Eufrasio*, 935 F.2d at 576. The predicate acts in count one involved Tocco's part in an illegal gambling business (sports betting and numbers) by bankrolling the operation. The overt acts charged in Count Two were periodic distributions of funds realized from this operation to the charged partners or co-conspirators. Therefore, the separate counts were justified in this case.

The unlawful collection involved in Count Two was shown through the testimony of Angelo Polizzi, who explained that the proceeds of his father's illegal gambling business were pooled by the enterprise and then filtered to the partners in the form of weekly draws and year-end bonuses. The unlawful debt is the gambling proceeds. The government notes that only the partners who received these payments, including Tocco, were charged in Count Two. Under these circumstances, the testimony of Angelo is sufficient for a reasonable jury to find that the elements of Count Two have been supported by the evidence.

(4) Count Six -- Hobbs Act Conspiracy

Tocco claims that the evidence was insufficient to show that Tocco knew of the purpose of the conspiracy to commit extortion by Nove Tocco and Paul Corrado, which is the basis for the Hobbs Act charge in Count Six. The jury acquitted Tocco of the underlying extortions or attempted extortions that were charged against him in the indictment,

but convicted him only of the conspiracy to commit those crimes. Tocco suggests that such verdicts are inconsistent and represent a compromise by some jurors who may not have thought that Tocco was actually involved in Nove Tocco's and Paul Corrado's affairs.

We agree with the government that the tape recorded conversations of Nove and Corrado, coupled with the Finnigan and Ruffino evidence, were sufficient to support Tocco's conviction on this count. Specifically, the tape recorded conversations of Nove and Corrado candidly showed a conspiracy to commit extortion by the collection of a "street tax," and also tended to show that Tocco had the authority to influence from whom they would extort money and how the collection of the "street taxes" would be enforced. The evidence also showed that agents Finnigan and Ruffino had met with Tocco to inform him that he would be held responsible personally for violent acts that two of his unnamed associates were planning. At the time, Tocco claimed ignorance and denied that any such association existed. Less than forty-eight (48) hours later, however, Nove and Corrado received the message that the FBI had visited Tocco and had given him that warning.

That evidence, when viewing all inferences in a light most favorable to the government, supports a finding that Tocco was involved in the conspiracy to commit extortion. Though the jury may have found it justifiable to acquit Tocco on the substantive extortion counts, it could very well have found contemporaneously that Tocco was involved to some degree in a conspiracy to commit those crimes.

In sum, from our review of the voluminous record in this case, we conclude that the evidence against Tocco on the three counts for which he was convicted was not only sufficient, but it was substantial. The portions of testimony and evidence mentioned above constitute only a portion of the evidence admitted into evidence during the course of the lengthy trial. Thus, we are firmly convinced that the district court did not err in failing to grant Tocco a judgment of acquittal on any of the three counts of conviction.

G. Sentencing of Tocco

The district court sentenced Tocco according to the recommendation in the presentence report, finding those calculations to be "accurate and correct." The report assigned Tocco a base offense level of 19, which is the minimum level for RICO convictions pursuant to U.S.S.G. § 2E1.1(a)(1). Three points were added pursuant to U.S.S.G. § 3D1.4, which sets out the enhancements due to the grouping of the various counts, making the adjusted offense level 22. The court agreed with the report's conclusion that no other enhancements were applicable, so the total offense level remained at 22. The district court then determined that this case was an extraordinary case, outside the "heartland" category of cases, and departed downward 10 levels from the guideline range based on Tocco's overwhelming community service (4 levels), Tocco's age and debilitating health (4 levels), and Tocco's wife's poor health (2 levels). Consequently, the final total offense level was 12, and with a criminal history category of I, the court noted that the applicable guideline range was 10 to 16 months. The court sentenced Tocco to 12 months and one day for each of the three counts of conviction, to be served concurrently,

followed by two years of supervised release, and recommended a community corrections center as the place of confinement. In addition, the court ordered Tocco to complete 705 hours of community service and imposed a fine of $75,000 plus and amount equal to the cost of incarceration and supervision (approximately $ 20,000). The district court denied the government's request for a forfeiture judgment.[10]

The government now appeals, claiming that the district court erred in applying the § 2E1.1(a)(1) minimum base offense level of 19 rather than the offense level applicable to the underlying racketeering activity of extortion pursuant to § 2E1.1(a)(2). The government also claims that the district court should have enhanced Tocco's sentence for his role in the conspiracy, and for specific characteristics of the extortion crime including the use of threats, the discharging of a firearm, and because the total loss was in excess of $ 10,000. According to the government, Tocco's offense level should have been 36, calculated pursuant to § 2B3.2, for a guideline range of 188-235 months. Furthermore, the government contends that the district court erred in departing downward ten levels. We will discuss each argument below.

At the outset, we note that we can recall no presentence report comparable to the one pertaining to Tocco in the instant case, containing what might well be construed as "arguments" that Tocco was not involved in most of the criminal activity of which he was convicted. The report takes pains to discredit the testimony of Angelo Polizzi, a key

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[10] We do not address the propriety of the district court's decision to deny the government's request for a forfeiture because the government did not raise that as an issue in its appeal.

witness for the government, referring to his criminal offenses, the loss of his license to practice law, and his receiving a sentence of probation in connection with his testimony.

It also makes reference to the affidavit of Tocco's deceased former attorney and to the statements of other "defense attorneys" who maintain that Tocco "has been under constant FBI surveillance," and that certain past events "justify any feelings of harassment that he may hold against the government." The probation officer concluded that "surveillance never produced a single instance where JACK WILLIAM TOCCO was observed committing a crime or overheard discussing a crime," and then added that "no evidence was introduced that JACK WILLIAM TOCCO has ever been in the company of all of the six men who are alleged by the Indictment to be 'capos' of the alleged Detroit organized crime group." Also along those lines, the report criticizes the government for its longstanding pursuit of Tocco, stating that Tocco has been under investigation for thirty years "and for some reason, the government waited until 1996, or until the defendant was aged and infirm, to indict him."

Overall, the probation office appears to have been preoccupied with expressing its concern that Tocco was unjustly pursued by the government or that his conviction was based on evidence that was not credible. We have addressed the concerns regarding the sufficiency of the evidence, and we will not reconsider those concerns at this juncture. Rather, we must focus on whether Tocco was lawfully and appropriately sentenced pursuant to the United States Sentencing Guidelines with reference to the record in this

case, keeping in mind the three counts on which Tocco was convicted.

We now turn to the government's assignments of error.

(1) The proper base offense level

First, the government contends that the district court erred in determining the base offense level for Tocco's RICO conviction. Because the proper application of the guidelines is a question of law, we will review this issue *de novo*. *United States v. Bazel*, 80 F.3d 1140, 1141 (6th Cir. 1996); *see also United States v. Morgano*, 39 F.3d 1358, 1378 (7th Cir. 1994).

The appropriate offense level should be determined by reference to U.S.S.G. § 2E1.1, which provides that the base offense level for unlawful conduct related to racketeer influenced and corrupt organizations is either 19 or "the offense level applicable to the underlying racketeering activity," whichever is greater. Here, the district court concluded, consistently with the recommendation in the presentence report, that 19 was the appropriate base offense level in this case. The report reviewed all of the overt acts of Tocco and determined that the guideline for the underlying offense was § 2E3.1, relating to gambling offenses, which requires a base offense level of 12. Because the RICO minimum is 19 was higher, the court used that number as the base offense level for sentencing purposes.

The government argues that the extortion of Ramzi Yaldoo produced the highest base offense level as that level

would have been calculated under U.S.S.G. § 2B3.2, which pertains to extortion by force or threats. According to the government's calculations, that extortion would dictate a base offense level of 18 and would be increased by 10 levels because that crime involved an express or implied threat of death, bodily injury, or kidnapping (increase of 2 levels, §2B3.2(b)(1)), a loss in excess of $ 10,000 (increase of 1 level, § 2B3.2(b)(2)), and the discharge of a weapon (increase of 7 levels, § 2B3.2(b)(3)(A)(i)).[11] In addition, as we will discuss below, the government advocates an increase of 3 levels for Tocco's supervisory role pursuant to U.S.S.G. §3B1.1(b). Finally, the government argues that a 5-level enhancement for grouping the offenses is appropriate under U.S.S.G. § 3D1.3. Thus, if the enhancements included by the government were applicable, Tocco's offense level applicable to the conduct related to the underlying racketeering activity would be 36 [18 + 2 + 1 + 7 + 3 + 5 = 36]. According to the government, the minimum base offense level of 19 under subsection (a)(1) would produce an offense level of 22, adding only the 3-level enhancement for a supervisory role to the base offense level of 19 [19 + 3 = 22]. Thus, because using the offense level applicable to the racketeering activity produces a higher adjusted level, the government argues that the court must use that number.[12]

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[11] The government claims that the Harry Bowman murder conspiracy would also require the same offense level.

[12] The government also argues that the court should have added 3 levels for Tocco's supervisory or managerial role, and 5 levels according to the grouping rules in U.S.S.G. § 3D1.4. We will address the basis for those increases separately. Here we are concerned with the appropriate base offense level, or starting point,

We must determine, then, whether the district court erred in applying the base offense level of 19 pursuant to §2E1.1(a)(1) or whether, according to § 2E1.1(a)(2), the court should have used "the offense level applicable to the underlying racketeering activity." The question becomes, then, what conduct must be considered in determining what constitutes "the underlying racketeering activity."

In this case, Tocco was convicted based on more than one underlying offense. The government claims that those offenses include, but are not limited to, (1) the extortion conspiracy (Count Six), (2) the illegal gambling operation, (3) & (4) the involvement in the Edgewater and the Frontier Hotels, (5) obstruction of justice, and (6) the Harry Bowman murder conspiracy. Application Note 1 to § 2E1.1 states that "where there is more than one underlying offense, [the court should] treat each underlying offense as if contained in a separate count of conviction for purposes of subsection (a)(2)." *Id.* In addition, that Application Note 1 directs the sentencing court to apply the adjustments contained in Chapter 3 of the guidelines to determine if the underlying offense would produce an offense level greater than 19.

Tocco claims that the government's argument must fail because there was no evidence adduced at trial to show that Tocco, himself, "committed, aided, abetted, counseled, commanded, induced, procured, or willfully caused" the criminal activity that the government seeks to use against him, or that the acts of his co-conspirators were "reasonably foreseeable" in furtherance of a "jointly undertaken criminal

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for Tocco's sentence.

activity." *See* U.S.S.G. § 1B1.3(a)(1). Tocco argues that the government impermissibly relies on the charges in the indictment, rather than what conduct was proven at trial, in determining the relevant conduct for sentencing. Tocco relies on the application notes of § 1B1.3(a)(1):

> In the case of a jointly undertaken criminal activity, subsection (a)(1)(B) provides that a defendant is accountable for the conduct (acts or omissions) of others that was both:
>
> (i) in furtherance of the jointly undertaken activity; and
>
> (ii) reasonably foreseeable in connection with that criminal activity.
>
> Because a count may be worded broadly and include the conduct of many participants over a period of time, the scope of the criminal activity jointly undertaken by the defendant (the "jointly undertaken criminal activity") is not necessarily the same as the scope of the entire conspiracy, and hence relevant conduct is not necessarily the same for every participant. In order to determine the defendant's accountability for the conduct of others under subsection (a)(1)(B), the court must first determine the scope of the criminal activity the particular defendant agreed to jointly undertake (i.e., the scope of the specific conduct and objectives embraced by the defendant's agreement). The conduct of

> others that was both in furtherance of, and reasonably foreseeable in connection with, the criminal activity jointly undertaken by the defendant is relevant conduct under this provision. The conduct of others that was not in furtherance of the criminal activity jointly undertaken by the defendant, or was not reasonably foreseeable in connection with that criminal activity, is not relevant conduct under this provision.
>
> In determining the scope of the criminal activity that the particular defendant agreed to jointly undertake (i.e., the scope of the specific conduct and objectives embraced by the defendant's agreement), the court may consider any explicit agreement or implicit agreement fairly inferred from the conduct of the defendant and others.

U.S.S.G. § 1B1.3, note 2.

We agree with the government that the offense level applicable to the conduct involved in the underlying racketeering activity may exceed the offense level produced by the § 2E1.1(a)(1) minimum level of 19, depending on what conduct is considered. The difficulty in this case is that the district court failed to make any specific findings on what conduct may be considered, and it failed to make any comparisons of the resulting offense levels from the underlying racketeering offenses. As we have stated, this case involves more than one underlying offense, and the district court must "treat each underlying offense as if contained in a

separate count of conviction of the purposes of (a)(2)." U.S.S.G. § 2E1.1, note 1.

We agree with Tocco that he can only be held responsible for actions of his co-conspirators that were in furtherance of the jointly undertaken activity and that were reasonably foreseeable in connection with that activity. *See* U.S.S.G. § 1B1.3. He is, however, "potentially liable for the foreseeable criminal acts of others in furtherance of th[e criminal] enterprise even though he did not personally participate in them." *United States v. Carrozza*, 4 F.3d 70, 75 (1st Cir. 1993). The district court made no findings whatsoever as to what criminal activities were in furtherance of the conspiracy and what activities were reasonably foreseeable by Tocco. We remand these issues to the district court, and we instruct the district court to determine which underlying offenses may properly be attributable to Tocco for purposes of sentencing him under § 2E1.1. The court should then determine the offense levels applicable to those offenses and "make the appropriate adjustments under Parts A through D of Chapter Three of the guidelines, using the [alternative] base offense levels in turn, and compare the results." *United States v. Sarault*, 975 F.2d 17, 18 (1st Cir. 1992) (determining that the district court properly followed the "protocol" of comparing the offense levels to determine whether it should use the minimum level of 19 or the offense level attributable to the underlying racketeering activity in sentencing the defendant); *see also United States v. Damico*, 99 F.3d 1431, 1436-37 (7th Cir. 1996) (noting that parties agreed on four "groups" of underlying racketeering activity).

The district court should note that any enhancement for grouping pursuant to § 3D1.3 would be added to the

offense level calculation in § 2E1.1(a)(2), but not to the minimum offense level calculation in § 2E1.1(a)(1) for purposes of determining which equation produces the greater result. *See Damico*, 99 F.3d at 1435 (finding that 4-level adjustment under § 3D1.4 caused the subsection (a)(2) calculation to exceed the calculation using the minimum level in subsection (a)(1)); *United States v. Boggi*, 74 F.3d 470, 473 (3d Cir. 1996) (reasoning that the (a)(2) calculation is greater because "only the subsection (a)(2) offense level will receive a four-level adjustment under section 3D1.4 "). When the court arrives at the alternative adjusted offense levels, it must apply the highest adjusted offense level in sentencing Tocco.

(2) Enhancements

As we have indicated, the district court rejected the government's contentions that Tocco's offense level should have been increased because of the threat of death, bodily injury, or kidnapping (2 levels, § 2B3.2(b)(1)); because the loss exceeded $ 10,000 (1 level, § 2B3.2(b)(2)); for the discharge of a weapon (7 levels, § 2B3.2(b)(3)(A)(i)); and for his supervisory role in the offense (3 levels, § 3B1.1(b)). The court also rejected the government's contention that a 5-level enhancement was appropriate under the grouping provisions of § 3D1.3. Whether Tocco's offense level should be enhanced by the first three items, which are specific offense characteristics of extortion, will depend on whether the district court ultimately sentences Tocco pursuant to § 2B3.2 or some other guideline. The court did not address those issues below because it used the minimum of 19 as the base offense level and did not refer to the specific offense characteristics in § 2B3.2(b), nor did it enhance the offense

level for Tocco's supervisory role. On remand, depending upon the district court's review of the application of the extortion guideline, the court must reconsider whether any enhancements under that guideline would apply under the circumstances.

At sentencing, after the district court announced that none of the government's requested enhancements were applicable to Tocco's offense level, the prosecutor asked whether the court adopted the presentence report's conclusion that "none of the threats or acts of violence were reasonably foreseeable" as part of the conduct involved. The district judge made no response or explanation to this pertinent question. We find that the foreseeability of the threats and acts of violence may be critical to the district court's analysis on remand, and we direct the district court to make specific findings with respect to that issue.

The government argues that the evidence supported a finding that Tocco was the "boss" of the enterprise and that he had a supervisory role over five or more persons, and that consequently a 3-level enhancement was warranted pursuant to U.S.S.G. § 3B1.1(b).[13] The government points out that in the sentencing of Nove Tocco and Paul Corrado the court followed the recommendations of different probation officers in holding the two accountable for a two-level increase for each one's role in the offense as an organizer, leader, manager, or supervisor. *See* U.S.S.G. § 3B1.1(c). Nove and

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[13] That guideline provides that "If the defendant was a manager or supervisor . . . and the criminal activity involved five or more participants or was otherwise extensive, increase by 3 levels." U.S.S.G. § 3B1.1(b).

Corrado managed John Sciaratta, John Jarjosa, and others who collected the "street taxes" for them. The government argues that adding the four other defendants in this case easily supports the claim that Tocco supervised five or more participants.

We find from a review of the record that the district court committed clear error in concluding that Tocco did not have a supervisory role in this case. As the government points out, the district court ignored the fact that the jury found Tocco guilty on Count Six, the Hobbs Act violation. The government's theory of the case was that Nove and Corrado could not engage in their extortionate activities without the permission of Tocco. The wiretapped conversations between Nove and Corrado showed that Tocco was the "boss" and that he had control over the extortionate activities of his underlings. The jury found Tocco guilty of conspiring to commit those extortionate activities in Count Six, indicating that they found Tocco to be the "boss" or "manager" or "supervisor." Under these circumstances, we instruct the district court on remand to apply the three-level enhancement for Tocco's supervisory role in the offense pursuant to U.S.S.G. § 3B1.1(b).

(3) Downward departure

As we stated above, the district court departed downward 10 levels based upon Tocco's overwhelming community service and support (4 levels), Tocco's age and debilitating health (4 levels), and Tocco's wife's poor health (2 levels). A district court's decision to depart downward from the applicable guideline level is reviewed for an abuse of discretion. *Koon v. United States*, 518 U.S. 81, 91, 135

L. Ed. 2d 392, 116 S. Ct. 2035 (1996). Whether a stated ground for departure is a permissible basis is a question of law reviewable de novo. *See id.* at 98. Before a departure is authorized, the circumstances of the case must be sufficiently unusual and "outside the heartland of cases" to warrant such a departure. *See United States v. Crouse*, 145 F.3d 786, 788-89 (6th Cir. 1998). If we determine that the departure was not based on impermissible factors, we must still determine whether the departure was reasonable in terms of the amount and the extent of the departure in light of the reasons for the departure. *See id.* at 789. In other words, we must find that the reasons justify the magnitude of the departure. *See id.*

Based on our conclusion that the district court must revisit the sentence imposed under the guidelines, we further instruct the court to reconsider its decision to depart from the guideline range once that range has been redetermined. We discuss below our views regarding the downward departure in this case to guide the district court's decision on remand.

In *Koon, supra,* the Supreme Court discussed what factors may or may not be considered by a district court in determining whether a departure from the guidelines is warranted. The Court discussed some "encouraged factors," which "are those 'the Commission has not been able to take into account fully in formulating the guidelines.'" *Koon*, 518 U.S. at 94 (citing U.S.S.G. § 5K2.0). The court also discussed "discouraged factors," which "are those 'not ordinarily relevant to the determination of whether a sentence should be outside the applicable guideline range.'" *Id.* at 95 (quoting 1995 U.S.S.G. ch. 5, pt. H, intro. comment.). Examples of those "discouraged factors" include a defendant's civic contributions and his family ties and

responsibilities. Though those factors are "not necessarily inappropriate," the Court noted, they should only be relied on as a basis for departure "in exceptional cases." *Id.*

The guidelines list certain factors that may never for the basis for departure. *See* U.S.S.G. § 5H1.10 (race, sex, national origin, creed, religion, socio-economic status); §5H1.4 (drug or alcohol dependence). With the exception of those factors, the guidelines do not "limit the kinds of factors, whether or not mentioned anywhere else in the guidelines, that could constitute grounds for departure in an unusual case." U.S.S.G. ch. 1, pt. A, intro. comment.

The district court in this case applied discouraged factors in departing downward, emphasizing insistently its view that this was an "extraordinary" case. The court stated that this case was outside of the heartland of cases, presenting "an extraordinary set of facts and is highly infrequent and rare. . . . It can be no rarer. The Court's [sic] never [departed in this manner] before and the Court does not contemplate doing it again soon." Then the court noted that the case has spanned over three decades and related to criminal activity that occurred over that entire period of time. The court also made the determination that Tocco did not have the type of "absolute power" that would justify him being held responsible for any and all criminal acts that the members or associates of his criminal enterprise may have committed or conspired to commit. Thus, the court was generally of the view that a downward departure was necessary.

With that as a preface, the court turned to the three specific factors on which it relied in making the 10-level

downward departure in Tocco's sentence. We now discuss those three factors.

(a) Community service and community support

First, the court found that Tocco's extraordinary community involvement and community support warranted a 4-level departure. The court noted that Tocco had participated in no less than twelve charitable and civic organizations. A flood of letters poured into the court that strongly supported Tocco and urged leniency in his sentencing. The letters stated, among other things, that Tocco is a dedicated family man and a dependable philanthropist in the community. These circumstances, the court found, helped to show that this case is outside of the heartland of cases.

We addressed the propriety of a departure in similar circumstances in *United States v. Crouse*, 145 F.3d 786 (6th Cir. 1998). *Crouse* involved the sentencing of a successful businessman much in the same category as Tocco. Though the applicable guideline range for his sentence was 15, the district court departed downward 9 levels based on the defendant's charitable works in order to bring his offense level down to 6 so that the defendant would qualify for home confinement. The court noted that the community contributions consisted primarily of the defendant's time commitments and not monetary contributions. *Crouse*, 145 F.3d at 792. On appeal, we determined that considering the defendant's charitable works, though a discouraged factor, was a permissible ground for the district court to consider departing downward. *See id.* at 791. We found, however, that the defendant's community works, while significant, were not unusual for a prominent

business man. The works included, but were not limited to, involvement in church activities, service on the boards of various organizations, and involvement in the Rotary Club. We concluded that, while some departure may have been warranted, the 9-level departure was unreasonable because the district court made no reference to the guidelines determining the departure amount. Rather, the district court sought to reach a certain result--no jail time--and it departed the necessary number of levels to reach the desired result. Consequently, we held that the departure was unreasonable under the circumstances. *See id.* at 792.

In assessing the effect of Tocco's community involvement in this case, we believe that much of Tocco's contributions may have consisted of contributions of money, not time and energy. If that is so, then the factor could really be considered one involving Tocco's socio-economic status, i.e., his wealth and his ability to donate to various civic and charitable causes. Consideration of that factor is prohibited by the guidelines. *See* U.S.S.G. § 5H1.10. This, perhaps, is an expression of the ancient concept of justice that a man of wealth, position, power, and prestige should not be given special consideration in the law. In any event, a defendant's community involvement is at best a discouraged factor in determining the appropriate departure from the guidelines.

On remand, the district court must determine whether the "community involvement" of Tocco is substantially financial, which would prevent the court from considering that factor in departing from the guidelines on that basis. If, however, the court finds as a matter of fact that the community involvement actually involves significant contributions of Tocco's time and personal skill and

involvement, the court may consider the factor in determining the appropriate and reasonable degree of departure if the court concludes that the case presents truly extraordinary circumstances. The district court should be mindful that any departure must be reasonable and must be "guided by the *structure of the Guidelines." Crouse, 145 F.3d at 792; see also United States v. Morken*, 133 F.3d 628, 630 (8th Cir. 1998); *United States v. McHan*, 920 F.2d 244, 247 (4th Cir. 1990).

(b) Tocco's age and debilitating health

The guidelines note that both age and physical condition may be valid grounds for a downward departure. U.S.S.G. § 5H1.1 provides in relevant part that although not "ordinarily relevant ... age may be a reason to go below the guidelines when the offender is elderly and infirm and where a form of punishment (e.g., home confinement) might be equally efficient as and less costly than incarceration." With respect to physical infirmity, the guidelines provide that a defendant's "physical condition or appearance, including physique, is not ordinarily relevant in determining whether a sentence should be outside the applicable guideline range. However, an extraordinary physical impairment may be a reason to impose a sentence below the applicable guideline range; e.g., in the case of a seriously infirm defendant, home detention may be as efficient as, and less costly than, imprisonment." U.S.S.G. § 5H1.4.

The district court below determined that Tocco's age, 72 years, and debilitating health, "which ordinarily would not be the basis for downward departure," was a basis for departure in this case. The court referred to the presentence

report which described all of Tocco's illnesses, including arteriosclerotic disease, coronary artery disease, hypertension, renal insufficiency, labrynthitis, and diverticulosis. The report also mentioned that Tocco's continuing health problems required "periodic monitoring."

We conclude that Tocco's age alone should not be considered as a basis for a substantial downward departure. Tocco was portrayed as remaining active in civic and charitable affairs and in carrying on (with family help and support) a number of business interests. The district court did not discuss any basis for consideration of Tocco's age as a basis of downward departure per se, as set out in the judgment. We observe in passing in this regard that eight judges of this court, still in service, are seventy years old or older. Many persons in business continue to serve in important capacities beyond seventy years of age.

With respect to the propriety of a downward departure based upon Tocco's physical condition, we note that it is possible "that an aged defendant with a multitude of health problems may qualify for a downward departure under §5H1.4 . . ., [but] such downward departures are rare." *United States v. Johnson*, 71 F.3d 539, 545 (6th Cir. 1995). In *Johnson*, the district court had departed downward from the applicable guideline range based on the defendant's medical condition. The defendant in that case had a profile similar to that of Tocco, being a 65-year-old man who suffered from diabetes, hypertension, hypothyroidism, ulcers, potassium loss, and reactive depression. *Id.* at 544-45.

The *Johnson* court stated that "in view of the fact that the defendant will be resentenced, the District Court should

make more specific findings as to whether defendant has 'an extraordinary physical impairment,' or combination of impairments, worthy of departure." *Id.* at 545. We find that this approach is proper in the instant case. To this end, the district court might obtain independent and competent medical evidence to determine the extent of Tocco's infirmities and the prison system's ability or inability to accommodate them. *Id.*

We are concerned about the discrepancy between the district court's actions in Tocco's case and in the case of Anthony Corrado. The district court declined to depart downward due to the medical condition of Corrado, who had undergone seven bypass operations, had circulation problems, and had diabetes. We shall expect the district court to consider the decision in Corrado's case when it determines whether or to what extent to depart in Tocco's case.

(c) Tocco's wife's health

Pursuant to the guidelines, "family ties and responsibilities . . . are not ordinarily relevant in determining whether a sentence should be outside the guidelines." U.S.S.G. § 5H1.6. However, "extraordinary family circumstances, **i.e.**, outside of the 'heartland' of cases the Guidelines were intended to cover, can be the basis for a downward departure." *United States v. Haversat*, 22 F.3d 790, 797 (8th Cir. 1994) (quoting *United States v. Harrison*, 970 F.2d 444, 447 (8th Cir. 1992)). The district court determined that Tocco qualified for a 2-level downward departure because of his "family ties," specifically his need

to be with his ill wife, who had cancer and emphysema.[14] The presentence report included an extensive and extremely sympathetic family history of Tocco, including information that his wife had recently undergone an operation, and that their eight children were successful and supportive.

Extraordinary and special family circumstances may justify a downward departure in exceptional cases. Usually, this factor is taken into account when a defendant personally is required to take care of a seriously ill spouse or family member. A good discussion of the type of circumstances necessary for such a departure can be found in *United States v. Haversat*, 22 F.3d 790, 793 (8th Cir. 1994). In that case, the district court had approved of a 5-level downward departure from the guidelines based on the defendant's wife's "severe psychiatric problems" which had "potentially life threatening" effects and thus constituted a "truly exceptional case." *Haversat*, 22 F.3d at 797. Though the court found that the defendant's family ties constituted a permissible basis for a downward departure, it concluded that the particular circumstances did not justify the magnitude of the departure. *Id.* at 798 (citing *Williams v. United States*, 503 U.S. 193, 117 L. Ed. 2d 341, 112 S. Ct. 1112 (1992)).

On remand, we instruct the district court to revisit this issue and to make specific findings regarding Tocco's personal involvement in the care of his wife or other family members. The court should consider whether Maria Tocco has alternate sources of support other than her husband. On

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[14] Tocco's mother and sister are also ill, but the district court did not rely on Tocco's responsibilities toward those family members in departing downward.

that subject we note that Tocco has eight children, seven of whom live in the area and one of whom is a doctor.

We specifically do not adopt the rationale in this regard, and in respect to other factors claimed by Tocco, applied in the case of *United States v. Rioux*, 97 F.3d 648, 652 (2d Cir. 1996), which approved a 10 point downward departure based on "physical condition, charitable fund-raising efforts, and civic accomplishments."

Thus, we conclude that the sentence imposed upon defendant Tocco was "imposed in violation of law" and that it was imposed as a result of an incorrect application of the guidelines for the reasons stated. We must, therefore, **REMAND** for re-sentencing in a manner not inconsistent with this opinion. Under the circumstances of this particular case, with respect to any written recommendations made by the probation office to the district court for resentencing, a copy will be made available to the parties. If a portion of such recommendation is based upon confidential information, the district court may excise such information for the protection of any third party.

During the interim before re-sentencing, we direct the district court to consider promptly the government's motions for immediate revocation of Tocco's bond. Furthermore, in connection with resentencing, the district court should reconsider whether a term of supervised release is appropriate, and also consider the place of incarceration and its potential for monitoring Tocco's medical problems.

H. Conclusion

We recognize that one of the most difficult and thankless responsibilities of a district judge is to pass sentence upon a defendant. The district court in this case was faced with a complex and lengthy trial, and we give the district court its due deference in effectuating a sentence upon Tocco, guided by all pertinent legal considerations. The district court must ordinarily rely in considerable measure upon a presentence report, but it is the district court that must make the hard decisions in cases such as this with a wide range of sentencing issues and legal determinations to be made. The district court has broad discretion in dealing with requests for departure, whether upward or downward, but the Sentencing Commission and the courts expect that they will not often occur, and only where there are particular "aggravating or mitigating circumstances of a kind or degree not adequately taken into consideration by the [Sentencing] Commission." *Koon*, 518 U.S. at 94.

Accordingly, we **AFFIRM** Tocco's convictions for the reasons explained above, but **VACATE** his sentence and **REMAND** for resentencing in a manner not inconsistent with this opinion.

APPENDIX E

UNITED STATES OF AMERICA
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

CASE NO. 96-80201

[November 13, 1998]

UNITED STATES OF AMERICA,
Plaintiff,
v.
D-1 JACK WILLIAM TOCCO,
Defendant.

SENTENCE HEARING
BEFORE THE
HONORABLE JOHN CORBETT O'MEARA
UNITED STATES DISTRICT JUDGE

[p. 18] ...THE COURT: I am going to speak for a moment. I think you can all sit down, it makes sense, before we get to the business end of this. To get right to the point, this Court's finds that the facts set out in the presentence investigation report are accurate and that the use of the facts and the [p. 19] methodology used to compute the offense level and the criminal history of the Defendant are accurate and appropriate; that the calculations of the probation department, which arrived at an offense level of 22 and a criminal history category of Roman Numeral I are accurate and correct.

To the extent that there are outstanding objections to the presentence investigation report made either by the Defendant or the Government which have not been resolved by the parties or dealt with by the Court, those objections are overruled.

The calculation of the offense level 22 and a criminal history category of I result in a guideline provision of 41 to 51 months; supervised release of two to three years; a range of possible fines on each count of I guess $7,500 to $75,000 and a special assessment which is required by statute of $150 which is $50 on each count upon which the Defendant was convicted.

The Court denies the Government's motion for upward departure for reasons which will become apparent in a discussion of downward departure which follows.

The decision of the Supreme Court of the United States in *Koon Versus the United States* [p. 20] decided in 1996 explicitly confirms the vesting of some degree of flexibility in fashioning sentences -- in the vesting in the sentencing court of some degree of flexibility. In doing so, the *Koon* court gave new authority to the reservation by the Sentencing Commission of the power of the trial court to determine that certain cases were outside the heartland of situations contemplated by the sentencing guidelines and 4B of Chapter 1 Part A which is the, these sections concern the guideline resolutions of major policy issues and this in particular concerns departures, and reads in part as follows: The Commission intends the sentencing courts to treat each guideline as a carving out of a heartland, a set of typical cases embodying the conduct that each guideline describes. When a court finds an atypical case, one which particularly, one to which a particular guideline linguistically applies to but where

conduct significantly differs from the norm the court may consider whether a departure is warranted.

And in further annotations having to do with the policy statements, the guideline, the Sentencing Commission indicated in one place that such cases would be highly infrequent, in its opinion, and [p. 21] elsewhere in 5K2, the commentary thereto which also discusses heartland cases, the Commission said, among other things that the Commission believes that such cases will be extremely rare.

Sentencing is the hardest part of this job, the part fraught with the most uncertainty and the most anxiety. This is the most complex case this court has seen or expects to see. These few words about the degree of difficulty involved in the sentencing are not meant or intended to elicit sympathy or for this audiences understanding. They're meant to speak to the guidelines themselves and perhaps to a court of appellate review.

A federal judge in this district court sentences approximately 60 to 75 defendants every year. This means, in rough numbers, that this judge has sentenced on the order of 250 defendants during his tenure on the bench. In sentencing roughly 250 defendants prior to this day in November of 1998, this court has never departed downward without a motion from the Government to do so under 5K1.1 or without the Government's on or off the record acquiescence in such downward departure; such acquiescence meaning that the Government agreed to the downward departure or at least did not object [p. 22] enough to contemplate appealing.

All of this is relevant because of the language of the policy statement from the guidelines which I quoted and because of the language of 5K2.0 to the effect that departure

should be reserved for those cases where there are mitigating or aggravating circumstances which are outside the heartland and which present an extraordinary set of facts and are highly infrequent or rare.

This case presents, in this Court's opinion such an extraordinary set of facts and is highly infrequent and rare. The departure of this Court contemplates against the will of the Government is as rare as it can be in this Court's judicial history. It can be no rarer. The Court's never done it before and the Court does not contemplate doing it again soon.

Sentencing and appellate courts before and after *Koon* have recognized that while some considerations for downward or upward departure are prohibited by the guidelines and others are discouraged, that, in appropriate cases, a variety of special facts and circumstances may constitute a proper basis for a sentencing court's decision to depart upwards or downwards.

[p. 23] With regard to downward departure, courts at various times have relied upon the following characteristics, among others, of a defendant, or facts informing the degree or quality of the offense or offenses, or facts external to the offense which, when extraordinary, which if extraordinary might provide a proper basis for downward departure.

Some of those categories of characteristics, which among others have been used, are the following: The community service of the defendant, the support in the community for the defendant, the health of the defendant, extraordinary family ties and responsibilities.

This case itself, perhaps particularly as it relates to this defendant, Jack William Tocco -- can you hear me all right, Mr. Tocco?

THE DEFENDANT: Yes, Your Honor.

MR. GRIEM: Thank you, Your Honor.

THE COURT: Presents a set of facts in this case, a set of facts and circumstances which everyone, that is everyone connected with this case from the Government to the Defense counsel to the probation department to the Court and to those observing and reporting to the public have properly identified as extraordinary. The overarching extraordinary nature of this case, and that's as independent of the more specific defendant offense and situational characteristics which this Court is in the process of finding warrant downward departure, independent of those, the extraordinary overarching [p. 24] nature of this case, the more general aspects of the case form the background and foundation for the Court's consideration of the more specific characteristics and make these considerations all the more well-defined and emphatic.

The Court wishes to say again what it said in its forfeiture decision, that nothing in this analysis should be heard as criticism of the Government for its presentation of the evidence in the case. The extraordinariness of the case in the three decades it covered presented the Government with very substantial and unusual obstacles which it overcame in obtaining guilty verdicts against the Defendant, against this defendant, Mr. Tocco, and others.

That having been said, this is a case in which the Government has convicted this defendant based upon evidence which spans three decades and evidence related to criminal activity which took place at different times over those 30 years and [p. 25] different places with different people involved. The jury found criminal acts pursuant to an ongoing conspiracy carried on by a criminal enterprise in violation of RICO.

The evidence of this conspiracy was found in the testimony of Angelo Polizzi with regard to what his now deceased father had told him about the criminal enterprise of which his father said, he, the father, was a member or partner.

The, existence and configuration of the organization was also testified to by FBI Special Agent Ruffino as an expert witness and was alluded to, and perhaps collaterally supported by the testimony of Salvatore Vitello. Without the testimony of Angelo Polizzi as to what his father told him, other testimony would have been insufficient in the opinion of the Court, to permit the RICO charges against this defendant to go to the jury.

The Government has emphatically, vigorously and effectively argued that this Defendant Mr. Jack William Tocco was the boss of this criminal enterprise which the Government and the FBI have referred to throughout as La Cosa Nostra. There was no other testimony so naming the criminal enterprise. [p. 26] It doesn't really matter what you name a criminal enterprise. An enterprise which is criminal can have any name that you want to put on it or no name at

all, and the result in terms of criminal liability under the law would not change.

The Government argues strongly that because this defendant was identified as the boss of the criminal enterprise -- and I say parenthetically that no special question was submitted to the jury on this issue nor was any asked for-- the Government argues strongly that because the Defendant was identified as the boss and argues it apparently relying upon analogies to corporate hierarchical organizations or military organizations, that he, the Defendant, must have approved, permitted and even motivated everything of a criminal nature of the enterprise or its members and associates did.

The Court believes no sufficient evidence requires the conclusion that this defendant had such absolute power as to hold him responsible for any criminal act, however remote in time and geography, however apparently ultra vires, to use a term for any criminal act, members or associates of the criminal enterprise may have committed or conspired to commit. It points out that in fact not a little of the [p. 27] evidence adduced at the trial is consistent with the proposition that older members of the criminal enterprise, including the Defendant Jack William Tocco, not only did not permit, encourage or motivate certain kinds of criminal activity, but opposed and sometimes attempted to keep it from happening.

The Court wants the record to reflect one or two other aspects of the evidence which not directly relevant to downward departure are important, I think, to the overall background of this case. During this decade of the 90's, the Court believes that the record is devoid of any suggestion of

criminal activity by members or associates of this criminal enterprise except for the street tax activity and efforts attendant Nove Tocco and Paul Corrado, Defendants sentenced last week, their efforts to collect such extorted funds and to the matters at issue in the Forman case, which involved, for purposes of this morning, the Defendant Anthony Joseph Corrado but not this defendant Mr. Tocco in any way.

And if either the Government's attorneys, the FBI or any other investigatory agency of the federal or state government has evidence of any ongoing criminal activity, ongoing now, and by this I [p. 28] mean anything that's taken place since the last recorded conversation made in connection with Nove Tocco and Paul Corrado's street tax activities, which I think was in December of 1992, it has not been brought to the attention of the Court.

The Court will now discuss four more specific areas which it believes separately and together provide support for downward departure in Mr. Tocco's case. The first of those is community service. And I will discuss that in connection with support in the community, although I point out that in some cases courts have treated them separately.

The presentence investigation report and the argument of counsel and the sentencing memoranda have this in much greater detail, but for the purpose of this record, the involvement of Jack William Tocco in such organizations as the Boys and Girls Club of Michigan; the Italian-American club; the Italian-American Cultural Center, the Madonna del Grazia Club; Holy Family Church; Grosse Pointe South Dad's Club; the Italian American Delegate Club; Operation

Kindness; Capuchin Monastery and Soup Kitchen; Italian Senior Citizens; Children's Hospital and perhaps most significantly, his involvement in the St. Louis Center in Chelsea, Michigan is [p. 29] extraordinary along with, and it fits against the background of this case.

The Court point points out in the analysis of the *Krause* case, Sixth Circuit's decision in that case, that his service has involved not simply monetary contributions but his time in many of these cases. And the Court points out that, further, that the analysis of the probation department in connection with this is that the community service standing alone would motivate, and I don't, I acknowledge for the record I'm not sure exactly what the process is for quantifying all of this, but would motivate a four level reduction coupled with the support from the community which Mr. Griem talked about. The Court finds extraordinary, out of the heartland and almost unprecedented the two taken together.

And I want to say that in connection with those letters, that I'm aware of the fact, we get letters when people are about to be sentenced, and some of them are letters that you expect to get because they're from loving family members and some of them are from people who have business relationships with a defendant and some of them, I'm sure some of, whatever the number is, three hundred [p. 30] letters written on behalf of Mr. Tocco I'm sure are, I mean some of them are family members' letters of course and some of them are people who have had business associations and others, where one might not be terribly surprised that they were writing and saying very nice things about the defendant.

There are a number of other letters written on behalf of Mr. Tocco by people of great probity in this community, known to the Court to be people of probity who would not likely write such letters. There are quite a few of them, and taken altogether, the Court is prepared to accept the recommendation of the probation department with regard to community service and support in the community.

Another basis for downward departure which the courts have in unusual cases accepted, the health problems of the defendant and, again, the presentence investigation report and the sentencing memoranda are replete with details of all of this. Suffice it to say at this point that Mr. Tocco is said by his doctors to have ongoing health problems related to arteriosclerotic disease, coronary artery disease, hypertension, renal insufficiency, labrynthitis and diverticulosis and he, in his 72nd year, this court find the combination of age and physical health [p. 31] problems, which ordinarily would not be the basis for downward departure, to be a basis and accepts the probation department's recommendation that that support a four level reduction in the offense level.

A further basis for the reduction in the offense level is found in the condition, health condition of the wife of Jack William Tocco who has suffered or does suffer from cancer and emphysema. Recently, this court, in the case of *U.S. versus Horn* supported a two level reduction based upon extraordinarily, extraordinary family ties and family responsibilities and this Court thinks that is warranted in this case as well.

In sum, the Court adopts the analysis and recommendation of the presentence investigation report which

concludes that a downward departure of ten offense levels is appropriate in this case and it emphasizes that while there is a calculation in the recommendation of the probation department of these ten offense levels based upon four for community, the reduction of four for community service and support in the community, four for the Defendant's health and two for the health of the Defendant's wife, that the Court does not necessarily base its ruling upon that quantified structure but believes that those [p. 32] conditions taken together and read against the generally extraordinary nature of the facts in this case support and justify a ten point reduction in offense level and finds, for custody purposes, it would be appropriate and the Court will sentence the Defendant at a 12 offense level, Roman Numeral I criminal history; the 12 offense level providing custody in the range of 10 to 16 months. The Court will now impose its sentence, if you would please return to the lectern, counsel and Mr. Tocco.

MR. CORBETT: Judge, could I ask for one clarification in the Court's, and I won't go into great length, I'm not going to go through the Court's determination as to the its position in the sentencing guidelines. Just to crystallize it, is it the Court's position, as was the probation department's, that in connection with the conspiracy to commit RICO and the conspiracy to commit extortion, none of the threats or acts of violence were reasonably foreseeable as part of that conspiracy? Just so I understand the basis, because I, if we're going to recommend appeal, I need to know that and it's not really clear. I think that's what Mr. Miller said and I'm not going to through it chapter and verse.

[p. 33] THE COURT: You're entitled to know that. I guess I would like to reflect upon that and we'll make a record.

MR. CORBETT: That would be fine.

THE COURT: I'll certainly give you whatever I can come up with in the way of a ruling on that, Mr. Corbett.

The Court will now impose its sentence. Pursuant to the Sentencing Reform Act of 1984, the Defendant is hereby committed to the custody of the Bureau of Prisons for a term of 12 months and one day on each count to be served concurrently. The Court recommends a community corrections center as a place of confinement.

The Court imposes, further, a fine of $75,000 on the Defendant and directs the probation department to calculate what the Court imposes as the cost of incarceration and cost of supervision and imposes those upon the Defendant as well. A special assessment as to each count of $50 is imposed, which totals $150.

Following the term of imprisonment, the Defendant shall be placed on a two year term of supervised release on each count to run concurrently. The conditions of supervised release are follows:

[p. 34] The Defendant shall abide by the standard conditions of supervised release as adopted by the U.S. District Court for the Eastern District of Michigan and the Defendant shall

perform 750 hours of community service at a facility approved by the Court.

The Court advises you, Mr. Tocco, that you're entitled to, as a matter of constitutional right, to appellate review of this sentence. If you're financially unable to provide counsel to perfect your appeal, the Court will appoint counsel for you and furnish counsel with such portions of the trial transcript, the record, anything that has happened that is relevant to the preparation for representing you on appeal, to allow counsel to file an appeal and prepare whatever papers are necessary to perfect that appeal. With very few exceptions, any appeal must be filed within ten days of today.

Is there anything else the record should reflect? I have in mind what you just asked me, Mr. Corbett, and please don't let me forget that, I mean I –

MR. CORBETT: I won't, Your Honor.

THE COURT: I'm sure you will.

MR. CORBETT: Your Honor, I move to cancel bond immediately.

[p. 35] MR. GRIEM: If I might?

MR. CORBETT: The statute requires it, Your Honor.

THE COURT: I know that's the position of the Government and I know what you're going to say Mr. Griem. The Court will cancel bond effective noon on Wednesday,

November 18, or it will be continued day-to-day thereafter until a bed is available in a community corrections center.

MR. GRIEM: Thank you, Your Honor.

MR. CORBETT: Your Honor, may I ask the Court's statutory authorization for that? It says shall be remanded in a case where there's a conviction for a crime violence; does not shall mean must be remanded? I ask the Court's reference to the statute.

THE COURT: I understand that has been your position throughout. discretion –

MR. CORBETT: Shall doesn't mean shall? Is that like is doesn't mean is?

THE COURT: Mr. Corbett, I've ruled on that and I spent about an hour this morning reading 3142 and 3143 of Title 18. I know what your position is. I don't think it's frivolous or -- you may even be [p. 36] right, but that's my ruling.

MR. GRIEM: Thank you, Your Honor.

THE COURT: Just a minute, Mr. Griem. Do you have anything further, Mr. Corbett, you'd like the record to reflect?

MR. CORBETT: Your Honor, I just want to say that I think this sentence is entirely inappropriate. It's an insult to the jury. The Court did exactly what it condemned in Krause which determined what the –

THE COURT: Mr. Corbett, this is not the time. There's a place and time for you. I didn't, it doesn't surprise me that the sentence doesn't please you, but that's not what I'm talking about. Should the record, as a matter of completion of the record, reflect anything else?

MR. CORBETT: I'm unaware of anything at this time other than -- oh, Your Honor, again, as regards what you've done earlier, I would trust that the judgment of conviction would include zero in the amount of forfeiture to afford the Government an opportunity to –

THE COURT: It will, yes. You saw the judgments on the other two cases. I just want to be sure that's what you wanted us to do.

(2)

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No. 02-1225

In the Supreme Court of the United States

JACK WILLIAM TOCCO, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether a court of appeals may adopt a rule that resentencing on remand is de novo unless the remand order limits its scope.

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In the Supreme Court of the United States

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 2a-32a) is reported at 306 F.3d 279. The opinion of the district court (Pet. App. 33a-92a) is unreported. The earlier opinion of the court of appeals (Pet. App. 93a-156a) is reported at 200 F.3d 401.

JURISDICTION

The judgment of the court of appeals was entered on September 6, 2002. A petition for rehearing was denied on November 19, 2002. Pet. App. 1a. The petition for a writ of certiorari was filed on February 14, 2003. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

After a jury trial in the United States District Court for the Eastern District of Michigan, petitioner was convicted of two counts of racketeering conspiracy, in violation of 18 U.S.C. 1962(d), and one count of Hobbs Act conspiracy, in violation of 18 U.S.C. 1951. He was sentenced to a prison term of a year and a day. The court of appeals affirmed the convictions but vacated the sentence and remanded for resentencing. On remand, the district court sentenced petitioner to a prison term of 34 months. The court of appeals again vacated the sentence and remanded for resentencing.

1. For 20 years, petitioner was the "Boss" of the Detroit family of the Mafia. He participated in illegal activities of various types, including extortion, illegal lotteries, bookmaking, loansharking, and acquiring undisclosed investments in gambling casinos. In 1996, petitioner and 16 others were charged in a 25-count indictment alleging crimes related to those activities. Petitioner was charged with 13 crimes: a Racketeer Influenced and Corrupt Organizations Act (RICO) conspiracy based on a pattern of racketeering activity (Count One); a RICO conspiracy based on collection of an unlawful debt (Count Two); a Hobbs Act conspiracy based on extortion (Count Six); and ten counts of extortion or attempted extortion. In 1998, after a three-month trial, petitioner was convicted of the two RICO conspiracies and the Hobbs Act conspiracy. He was acquitted on the other charges. Pet. App. 3a-4a, 94a-95a.

The district court sentenced petitioner to a prison term of a year and a day, to be followed by two years of supervised release, and a fine of $94,447.32. His sentence was based on an offense level of 12. The district

court found that petitioner's base offense level was 19 under the guideline for racketeering crimes and added three levels under the grouping rules. The court then departed downward by ten levels, based on petitioner's community service, his age and poor health, and his wife's poor health. Pet. App. 4a-5a, 135a-136a.

2. The court of appeals affirmed petitioner's convictions but vacated his sentence and remanded for resentencing. Pet. App. 94a-156a. Under Sentencing Guidelines § 2E1.1(a), the base offense level for a RICO offense is the greater of 19 or the offense level applicable to the underlying racketeering activity. The court of appeals held that the district court had erred in using a base offense level of 19 without making any findings "as to what criminal activities were in furtherance of the [RICO] conspiracy and what activities were reasonably foreseeable [to petitioner]." Pet. App. 143a. The court accordingly instructed the district court to determine on remand "which underlying offenses may properly be attributable to [petitioner] for purposes of sentencing him under § 2E1.1" (*ibid.*), and, in the event that it finds the extortion guideline applicable, to "reconsider whether any enhancements under that guideline would apply" (*id.* at 145a). The court also held that the district court had clearly erred in not imposing a three-level supervisory-role enhancement, and directed the district court to apply the enhancement on remand. *Id.* at 145a-146a. As for the downward departure, the court held that the district court had not made sufficiently particularized findings to support the departure on any of the three grounds on which it relied, and it instructed the district court to reconsider each ground. *Id.* at 146a-155a.

3. On remand, the district court sentenced petitioner to 34 months' imprisonment, to be followed by two

years of supervised release, and reimposed a fine of $94,447.32. The new sentence was based on an offense level of 20. The district court used a base offense level of 18 for the Hobbs Act conspiracy, and added three levels for petitioner's supervisory role and three levels under the grouping rules. It then departed downward by four levels, based on petitioner's community service, but declined to depart on any other ground. As it had at petitioner's initial sentencing, the court found that the base offense level for the RICO conspiracy charged in Count One was 19, the guideline minimum, because the only underlying racketeering activity found by the court had lower offense levels. Pet. App. 6a, 84a-92a.

4. The court of appeals again vacated the sentence and remanded for resentencing. Pet. App. 2a-32a.

The court held that the district court had improperly calculated the offense level for the Count One RICO conspiracy offense. Pet. App. 8a-25a. In particular, the court held that the district court had clearly erred in not finding that petitioner had committed two underlying racketeering offenses; had clearly erred in failing to impose a four-level leadership-role enhancement in calculating the offense level for a racketeering offense that the district court found petitioner did commit; and had erred in failing to consider whether petitioner had committed other racketeering offenses. *Id.* at 10a, 11a-16a, 18a-23a. Relying on Sentencing Guidelines § 1B1.2(d), which provides that "[a] conviction on a count charging a conspiracy to commit more than one offense shall be treated as if the defendant had been convicted on a separate count of conspiracy for each offense that the defendant conspired to commit," the court of appeals also held that the district court had failed to consider petitioner's responsibility for the various acts of extortion listed in the Hobbs Act con-

spiracy count. Pet. App. 25a-28a. The court therefore remanded the case for the district court to "recalculate [petitioner's] Count 1 RICO conspiracy base offense level and his Count 6 Hobbs Act conspiracy offense level." *Id.* at 31a.

The court of appeals rejected petitioner's claim that the district court had exceeded the scope of the previous remand in resentencing him. Pet. App. 28a-29a. The court agreed with petitioner that the remand was "limited" (*id.* at 28a), but did not agree that the limitations it imposed prevented the district court from "assess[ing] * * * underlying racketeering activity for the purpose of calculating [petitioner's] Count 1 RICO conspiracy base offense level" or from "assess-[ing] * * * appropriate bases for downward departure" (*id.* at 29a). On the contrary, the court explained, the previous opinion directed the district court to determine which underlying racketeering offenses should be attributed to petitioner and to reconsider its decision to depart. *Id.* at 29a-30a. Quoting *United States* v. *Campbell*, 168 F.3d 263, 265 (6th Cir.), cert. denied, 528 U.S. 882 (1999), the court explained that "[g]eneral remands * * * give district courts authority to address all matters as long as remaining consistent with the remand," while "limited remands explicitly outline the issues to be addressed by the district court and create a narrow framework within which the district court must operate." Pet. App. 29a. In *Campbell*, the Sixth Circuit applied its rule that "a district court can review sentencing matters de novo unless the remand specifically limits the lower court's inquiry." 168 F.3d at 265.

ARGUMENT

Petitioner points to a disagreement among the courts of appeals on whether resentencing after a remand is presumptively de novo or presumptively limited to correction of the errors found on appeal. Pet. 6-9. He asks the Court to grant certiorari and establish a presumption of limited resentencing. Pet. 11-14. For two independent reasons, this is not an appropriate case for the Court to adopt a rule concerning the scope of resentencing. First, in the decision of which petitioner seeks review, the court of appeals again remanded the case to the district court, and this Court ordinarily does not review interlocutory decisions. Second, because the court of appeals specified in its first opinion that resentencing was to be limited, the result would be the same no matter what default rule the Court established. This Court has repeatedly declined to grant review in cases presenting the question raised by petitioner, see *Hass* v. *United States*, 531 U.S. 812 (2000) (No. 99-1694); *Harris* v. *United States*, 525 U.S. 1148 (1999) (No. 98-6358); *Marmolejo* v. *United States*, 525 U.S. 1056 (1998) (No. 98-5372); *Whren* v. *United States*, 522 U.S. 1119 (1998) (No. 97-6220), and there is no reason for a different result here.[1]

1. In the decision petitioner asks this Court to review, the court of appeals again vacated petitioner's sentence and remanded the case to the district court for resentencing. The decision is therefore interlocutory, a posture that "of itself alone furnishe[s] sufficient ground" for the denial of certiorari. *Hamilton-Brown*

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[1] The same issue is raised in two other cases now pending before this Court: *Donato* v. *United States*, No. 02-1191 (filed Feb. 6, 2003), and *Robison* v. *United States*, No. 02-9096 (filed Feb. 12, 2003).

Shoe Co. v. *Wolf Bros. & Co.*, 240 U.S. 251, 258 (1916). Accord *Brotherhood of Locomotive Firemen & Enginemen* v. *Bangor & Aroostook R.R.*, 389 U.S. 327, 328 (1967); *American Constr. Co.* v. *Jacksonville Ry.*, 148 U.S. 372, 384 (1893); *Virginia Military Inst.* v. *United States*, 508 U.S. 946 (1993) (Scalia, J., concurring). This Court ordinarily denies petitions by criminal defendants challenging interlocutory determinations that may be reviewed at the conclusion of the criminal proceedings. See Robert L. Stern et al., *Supreme Court Practice* § 4.18, at 258 n.59 (8th ed. 2002). The practice promotes judicial efficiency by ensuring that all of the defendant's claims can be consolidated and presented in a single petition to the Court. See *ibid.* While not an invariable rule, the practice makes particular sense in this case, where petitioner challenges the sentencing procedures administered by the court of appeals, and his sentence is not yet final.

2. a. Under 28 U.S.C. 2106, a court of appeals may "affirm, modify, vacate, set aside or reverse any judgment, decree, or order" of the court whose decision it is reviewing, and may "remand the cause and direct the entry of such appropriate judgment, decree, or order, or require such further proceedings to be had as may be just under the circumstances." In addition, the statute governing sentencing appeals, 18 U.S.C. 3742, provides that, when a court of appeals finds a sentencing error, it must "remand the case for further sentencing proceedings with such instructions as the court considers appropriate." 18 U.S.C. 3742(f)(1), (2)(A), and (2)(B). It is thus well settled that, after a court of appeals has reversed the judgment in a criminal case, it has authority to provide either for de novo resentencing or for a limited resentencing. See, *e.g.*, *United States* v. *Moore*, 131 F.3d 595, 597-598 (6th Cir. 1997); *United States* v.

Santonelli, 128 F.3d 1233, 1238 (8th Cir. 1997); *United States* v. *Webb*, 98 F.3d 585, 587 (10th Cir. 1996), cert. denied, 519 U.S. 1156 (1997); *United States* v. *Polland*, 56 F.3d 776, 777 (7th Cir. 1995); *United States* v. *Pimentel*, 34 F.3d 799, 800 (9th Cir. 1994), cert. denied, 513 U.S. 1102 (1995). It is also well settled that, except perhaps in extraordinary circumstances, a district court conducting a resentencing must act in conformity with the mandate of the court of appeals. See, *e.g.*, *Moore*, 131 F.3d at 598; *Webb*, 98 F.3d at 587; *United States* v. *Tamayo*, 80 F.3d 1514, 1519-1520 (11th Cir. 1996); *Polland*, 56 F.3d at 777-779; *Pimentel*, 34 F.3d at 800; *United States* v. *Bell*, 5 F.3d 64, 66 (4th Cir. 1993). The courts of appeals are thus in agreement that they have discretion to determine the scope of a resentencing, and that the district court is obligated to follow the directions of the court of appeals when conducting the resentencing.

There is a disagreement among the courts of appeals, however, on the narrow question of the proper scope of a resentencing when the court of appeals gives no indication as to the intended scope of proceedings on remand. Some courts of appeals have held that resentencing in such cases is limited to correction of the errors found on appeal. See *United States* v. *Ticchiarelli*, 171 F.3d 24, 32 (1st Cir.), cert. denied, 528 U.S. 850 (1999); *United States* v. *Marmolejo*, 139 F.3d 528, 530-531 (5th Cir.), cert. denied, 525 U.S. 1056 (1998); *United States* v. *Whren*, 111 F.3d 956, 958-960 (D.C. Cir. 1997), cert. denied, 522 U.S. 1119 (1998); *United States* v. *Parker*, 101 F.3d 527, 528 (7th Cir. 1996). Other courts of appeals, including the Sixth Circuit, have held that resentencing in such cases is de novo. See *United States* v. *Faulks*, 201 F.3d 208, 210 (3d Cir. 2000); *United States* v. *Keifer*, 198 F.3d 798, 801

(10th Cir. 1999); *United States* v. *Stinson*, 97 F.3d 466, 469 (11th Cir. 1996), cert. denied, 519 U.S. 1137 (1997); *United States* v. *Jennings*, 83 F.3d 145, 151, amended, 96 F.3d 799 (6th Cir.), cert. denied, 519 U.S. 975 (1996); *United States* v. *Ponce*, 51 F.3d 820, 826 (9th Cir. 1995); *United States* v. *Cornelius*, 968 F.2d 703, 705 (8th Cir. 1992). The rule in the Second Circuit is that resentencing is presumptively de novo when one or more counts of conviction have been overturned and presumptively limited when all convictions are affirmed but the court of appeals finds an error in sentencing. See *United States* v. *Quintieri*, 306 F.3d 1217, 1225-1228 (2002), petition for cert. pending, No. 02-1191 (filed Feb. 6, 2003).

b. It is not clear that there is any need for this Court to adopt a uniform rule for all the courts of appeals, because the rules concerning resentencing on remand might appropriately be viewed as local rules that can differ from circuit to circuit. So long as such local rules are reasonable, see *Thomas* v. *Arn*, 474 U.S. 140, 146-148 (1985), and consistent with Acts of Congress and the Federal Rules of Appellate Procedure, see Fed. R. App. P. 47(a), there is no requirement of "uniformity among the circuits in their approach to [these] rules." *Ortega-Rodriguez* v. *United States*, 507 U.S. 234, 251 n.24 (1993).[2] But even if there should be a uniform rule

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[2] Two courts of appeals have suggested a connection between the court's rule concerning the scope of resentencing on remand and the provision of Federal Rule of Criminal Procedure 32 (currently Fed. R. Crim. P. 32(i)(1)(D)) that allows new claims to be raised at any time before the imposition of sentence "for good cause." See *United States* v. *McCoy*, 313 F.3d 561, 564-567 (D.C. Cir. 2002) (en banc); *United States* v. *Moore*, 83 F.3d 1231, 1235 (10th Cir. 1996). To the extent that a court of appeals considers its rule on the scope of resentencing to be compelled by the Federal

governing resentencing, this is not an appropriate case for the Court to establish one, because the Court's decision would have no effect on the outcome of the case.

Petitioner contends that the presumption in the Sixth Circuit is that resentencings are de novo (Pet. 8-9); that the presumption was applied in this case (Pet. 11); and that the result would have been different if he had been sentenced in a number of other circuits (Pet. 10-11). Petitioner is correct on the first point, but mistaken on the second and third. It is true that the rule in the Sixth Circuit is that resentencings are presumptively de novo. See, *e.g.*, *Campbell*, 168 F.3d at 265; *Jennings*, 83 F.3d at 151. As explained below, however, the presumption was not applied in this case. Instead, resentencing was specifically limited by the court of appeals. And since the remand was for a limited, not a de novo, resentencing, the result here would have been the same in a circuit where resentencings are presumptively limited.

After the first appeal, the court of appeals remanded for a determination of "which underlying offenses may properly be attributable to [petitioner] for purposes of sentencing him under [the racketeering guideline]" (Pet. App. 143a); for imposition of a supervisory-role enhancement (*id.* at 146a); and for reconsideration of the downward departure (*id.* at 149a-155a). The district court acknowledged that that was the scope of the remand (*id.* at 35a-36a), and resentenced petitioner accordingly (*id.* at 36a-92a). On appeal from the resentencing, the court of appeals explicitly held that its "previous remand was limited" (*id.* at 28a) and that the

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Rules of Criminal Procedure, the rule cannot properly be viewed as a local rule of practice.

district court had not exceeded the scope of the limited remand in resentencing petitioner (*id.* at 29a-30a).

Petitioner thus was given what he claims to be seeking: a limited resentencing. And since the court of appeals specified that resentencing was to be limited, the question that has divided the courts of appeals —what the default rule should be when the court does *not* specify whether resentencing should be de novo or limited—is not presented in this case. To the extent that petitioner is claiming that the court of appeals erred in characterizing the prior remand as limited, or that it erred in finding that the district court had not exceeded the scope of the remand, the claims are fact-bound and do not merit this Court's attention.[3]

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[3] There is another reason why the Court should not grant certiorari in this case to establish a uniform rule concerning the scope of resentencing. A new subsection (g), entitled "Sentencing Upon Remand," was recently inserted in 18 U.S.C. 3742, the statute that governs sentencing appeals. See PROTECT Act, Pub. L. No. 108-21, § 401(e), 117 Stat. 671. Among other things, the new subsection (g) provides that a district court must "resentence [the] defendant in accordance with section 3553," which sets forth the factors to be considered in imposing sentence and requires that the Sentencing Guidelines ordinarily be applied, and that the only grounds for a departure following a remand are those specifically relied upon at the original sentencing and approved by the court of appeals. In interpreting Section 3742(g), one or more of the courts of appeals may conclude that the provision supersedes the existing rule concerning resentencing, either in whole or in part. Over time, therefore, the disagreement among the courts of appeals may diminish or even disappear.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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No. 02-1225

In the Supreme Court of the United States

JACK WILLIAM TOCCO,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

REPLY TO BRIEF IN OPPOSITION

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REPLY BRIEF FOR THE PETITIONER

The government, on page six of its Brief in Opposition, notes that this petition is one of three petitions now pending before this court that raise the deepening and persistent split of authority in the circuit courts over procedure and practice in resentencing and sentencing appeals. *See, Donato v. United States,* No. 02-1191 (Petition for Certiorari filed February 6, 2003) and *Robison v. United States,* No. 02-9096 (Petition for Certiorari filed February 12, 2003). Each petition is from a circuit that follows the minority rule permitting de novo resentencing unless otherwise ordered.

The instant petition is distinctly different from the petitions in *Donato* and *Robison* for two reasons: (1) this petition is the only petition of the three which squarely presents the split in the circuits regarding whether second sentencing appeals are limited by the "law of the case" to the issues raised in the first appeal and (2) this petition opposes de novo resentencing. If the Court wishes to resolve whether the law of the case applies to second sentencing appeals, as well as consider opposing arguments from defendants as to whether resentencing is presumptively de novo, this Court should grant all three petitions and consolidate for argument.

In the instant case, a petition from the Sixth Circuit in a case where the government appealed a sentence, the petitioner asks this Court to impose as uniform rules for the circuits the rules followed in the majority of the circuits, but not followed in the Sixth Circuit: (1) resentencing is not presumptively de novo and (2) new issues cannot be raised in a second sentencing appeal if they could have been raised in the first appeal. The Sixth Circuit held that the government could relitigate sentencing issues at a second sentencing, and

granted relief to the government on new issues raised for the first time in the second sentencing appeal. The ruling of the Sixth Circuit is consistent with the rules it normally follows in sentencing appeals.

In *Donato* and *Robison,* petitions from the Second and Ninth Circuits in cases where the defendants sought review of their sentences, the petitioners ask this Court to impose as a uniform rule the rule followed by the minority of circuits, and usually followed in the Second and Ninth Circuits: resentencing is presumptively de novo. In *Donato* and *Robison*, the lower court denied de novo resentencing to the defendants. The denial of de novo resentencing in *Donato* and *Robison* is contrary to the rule those two circuits normally follow. *Donato* and *Robison* not only present the split of authority between the circuit courts, they also illustrate that the rules governing resentencing and sentencing appeals are not uniform within a circuit.

The split of authority in the circuit courts over whether second sentencing appeals are limited by the issues raised in the first sentencing appeal, limited by the law of the case, was raised as a principal reason for granting this Writ in the Petition. Nonetheless, although the government asks this court not to resolve the split of the circuits concerning whether resentencing is de novo, the government does not take a position on the resolution of the split of the circuits regarding what issues can be raised in second sentencing appeals. The Sixth Circuit is one of only four circuits that do not apply the law of the case to a second sentencing appeal to bar issues that could have been raised in the first appeal. *See, United States v. Hebeka,* 89 F. 3d 279, 284 (6th Cir.), cert. den. 519 U.S. 999 (1996), and cases cited at Pet., p. 9. Eight circuits do apply the law of the case to second sentencing appeals, see cases discussed at Pet., pp.6-7. The government

states no position on adoption of the rule in *United States v. Ticchiarelli,* 171 F.3d 24, 28-29 (1st Cir.) cert. den. 528 U.S. 850 (1999), that a judge's sentencing decision "unchallenged in a subsequent appeal despite the ample opportunity to do so" cannot be challenged in a second sentencing appeal because "the aggrieved party is deemed to have forfeited any right to challenge that particular decision at a subsequent date." The government apparently does not disagree that this rule promotes "the proper working relationships between trial and appellate courts * * * *" This rule should have been applied to the government's appeal by the Sixth Circuit.

The government suggests in its Brief that granting this petition would make no difference in the petitioner's case. Nothing could be farther from the truth. Since it was the government who brought both the first and second sentencing appeals in this case, it is the petitioner who is profoundly affected by the fact that the Sixth Circuit did not follow the rule of the majority of the circuits, and granted relief to the government on three, new sentencing issues in the second appeal that could have been raised in the first sentencing appeal but were not: The Sixth Circuit ordered recalculation of the petitioner's guidelines for his Count 6 conviction, which was not challenged by the government or ruled on by the court in the first appeal, and the Sixth Circuit ordered two, new enhancements for the petitioner's leadership role, despite the fact that the government had sought only one enhancement in the first appeal, and the court had ordered that enhancement at resentencing. In granting relief to the government in the second appeal, the Sixth Circuit, like the government in its Brief in Opposition, refused to address the arguments of petitioner, supported by cases in other circuits and clearly raised in his brief on appeal, reply brief, and motion for rehearing, that a circuit court cannot consider in a second appeal challenges to the trial court's sentence by the

government that could have been raised in the first appeal but were not.

The government argues in its Brief that since the Sixth Circuit found that petitioner's first sentencing reversal resulted in a limited remand and that the district court followed the remand, the question of whether the petitioner was harmed by de novo resentencing is not appropriately presented in this case because it is "factbound." First, this argument ignores the petitioner's principal argument that it was primarily the consideration of new sentencing issues in the second appeal, contrary to the rule of other circuits, that aggrieved the petitioner, not de novo resentencing per se. Second, this argument ignores the actual holding of the Sixth Circuit that upheld a de novo resentencing. The Sixth Circuit found that although the first panel found no error in failing to find the petitioner responsible for certain acts of racketeering in the RICO conspiracy in Count One, and no error in departing downward, the court's "limited" remand to make further findings and reconsider the downward departure permitted the district court to completely reconsider the calculation of the sentencing guidelines for petitioner's conviction in Count One, and completely reconsider all downward departures. See, App. B, p. 28a-31a. In other words, the Sixth Circuit found that the opinion of the first panel permitted de novo review of the calculation of the sentencing guidelines for Count One and de novo review of the downward departures, not restricted by the law of the case or limited by the issues raised by the government in the first appeal.

The government also argues that the petitioner seeks review of an interlocutory decision of the Sixth Circuit, and notes that this court does not "ordinarily" review interlocutory opinions. This argument ignores the fact that

the remand in this case is with such explicit direction that the district court has virtually no discretion.[1] The issues raised in this petition involve the very power of the court to reverse and remand for reconsideration issues waived in a first appeal, and the issues are ripe for review and well presented by this case. The conflicts in the circuits regarding the presumptive scope of resentencing and the permissible scope of second sentencing appeals are most likely to be presented to this court in future cases which seek review of an order of the circuit court granting an improper remand to the court below.

Apparently the government, in opposing a grant of certiorari at this stage of the proceedings, believes that judicial economy would be promoted by requiring the petitioner to (1) go back to district court for resentencing, (2) place objections on the record to de novo resentencing and reconsideration of issues already decided at the first sentence and not appealed (objections that have already been overruled by the Sixth Circuit), (3) incur a *third* sentence to incarceration after being released from custody a *second* time, (4) appeal these same issues (already rejected by the Sixth Circuit) in a third appeal, and (5) apply for certiorari again.

[1] The court must add four levels for a leadership role to one of the underlying racketeering offenses attributable to the petitioner in Count One, must include the Edgewater Hotel conspiracy as a racketeering offense attributable to the petitioner in Count One, cannot hold the petitioner responsible for an alleged murder conspiracy, must include the Hobbs Act conspiracy as a racketeering offense attributable to the petitioner in Count One, must find the petitioner responsible for at least one act of extortion in Count One, must attribute an extortion offense to the defendant in Count Six, and must add two levels to any extortion offense attributable to the defendant in Count Six. App. B, pp. 13a-14a, 16a, 18a, 23a, 24a-25a, 27a.

As this court has noted in opinions addressing the propriety of granting certiorari in cases that have ordered a remand, there is no rule prohibiting such a grant, although it may be a reason to deny certiorari. In this particular case, it makes no sense for the petitioner to have to jump through the five hoops listed above simply because the decision below remanded the case to the district court. The defendant in a criminal case has some interest in the finality of his sentence, despite the existence of the government's right to appeal. This court should not promote the years of appeals that the de novo resentencing rule produces. Waiting to review this case until after remand might result in a fourth sentencing proceeding for petitioner, which has happened before in de novo resentencing circuits (see argument below).

The government also argues that there need not be a uniform rule in the circuits regarding whether sentencing is de novo. As long as some circuits permit de novo resentencing, although most do not, and some circuits permit new issues to be raised in a second sentencing appeal, while most bar those issues if they could have been raised in the first appeal, there will be sentencing disparity throughout the circuits. If there is no uniform rule, the government will prevail as appellee in some circuits because the defendant is barred from de novo resentencing and cannot seek review of issues not raised in a first appeal, and the government will prevail as appellant in other circuits because the government is permitted to seek de novo resentencing and is able to raise new issues in a second appeal. Likewise, defendants will prevail as appellee in some circuits because the government cannot obtain de novo resentencing or raise new issues on appeal, and will prevail as appellant in other circuits because they obtain de novo resentencing and raise new issues on appeal. These disparate results do not arise from the way circuit courts craft their remand orders, or from the needs of various circuits for local

rules; rather, the disparate results result from several different rules being applied in several different circuits. The results of a sentencing appeal depend on where a defendant is sentenced.

Although the petitioners in *Donato* and *Robison* urge this court to adopt a de novo sentencing rule or presumption, this petitioner opposes such a rule because of its impact on the finality of sentence. De novo resentencing can result in negation of sentencing appeals, and multiple sentencing appeals. In *United States v. Duso,* 42 F. 3d 365, 368 (6th Cir. 1994), because resentencing was de novo, it was permissible for the district judge to recalculate the drug quantity and the applicable guidelines to increase the defendant's sentence to 41 months, after the court's upward departure to 36 months had been reversed in the first appeal. The circuit court on review of the second sentence stated that "rules of elemental fairness" may "someday" prevent such a result, but "someday" has not arrived yet in the Sixth Circuit. As noted in the petition, there has been at least one case in the Sixth Circuit and one in the Eighth Circuit, both de novo resentencing circuits, where the defendant has been sentenced four times. Pet., p. 13.

There are strong reasons why this Court should resolve these opposing rulings of the various circuits and create uniform rules prohibiting resentencing de novo as a general rule and limiting second sentencing appeals to issues raised in the first appeal which could have been raised. As noted by the *Donato* Petition and Reply Brief, this court has granted certiorari numerous times to secure uniform practice and procedure in federal courts. *Donato* Pet., pp. 12-13, Reply Brief, pp. 1-3. "Judicial supervision of the administration of criminal justice in the federal courts implies the duty of establishing * * * standards of procedure and

evidence," *McNabb v. United States,* 318 U.S. 332, 340 (1943).

Sentencing proceedings are an application of the principals of The Sentencing Reform Act and The Comprehensive Crime Control Act of 1984, Pub. L. No. 98-473, 98 Stat 2011, enacted by Congress to promote uniformity in sentencing. Rules of the circuit courts that conflict and create disparity in sentencing results violate the purpose of this act.

Sentencing proceedings are governed by the Rules of the Court, particularly Fed. R. Crim. P. 32(f) and (h),[2] which govern objections made at sentencing or resentencing, and Rules 51[3] and 52,[4] regarding preserving claimed errors and plain error. Permitting a party at a second sentencing to challenge a ruling of the court that was identical to a ruling of the court at the first sentencing, but not objected to, violates Rule 32, unless sentencing is de novo in every instance. Permitting a party on appeal to raise an issue that could have been raised in the first appeal but was not, violates Rules 32, 51, and 52 if there was no objection to the trial court's ruling,

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[2] Fed. R. Crim. P. 32 provides in subsection (f) that objections to the calculations of the guidelines in a presentence report must be made within fourteen days after the parties receive the report. Subsection (g) of the same rule permits a new objection at sentencing for "good cause."

[3] Fed. R. Crim. P. 51 provides that a party may preserve a claim of error "by informing the court—when the court ruling is made or sought—of the action the party wishes the court to take, or the party's objection to the court's action and the grounds for that objection."

[4] Fed. R. Crim. P. 52 provides that "[a] plain error that affects substantial rights may be considered even though it was not brought to the court's attention."

and violates the "law of the case" doctrine which has been judicially developed to prevent repetitive relitigation.

The discretion of the circuit courts to enter appropriate remand orders created by Congress in 28 U.S.C. § 2106 and 18 U.S.C. § 3742 is not violated by this court's declaration of uniform, presumptive rules governing resentencing and sentencing appeals. If the court adopts as a uniform rule the majority rule that resentencing is not *presumptively* de novo, there is nothing to prevent circuit courts from finding in any particular case that resentencing is required to be de novo because of the vacation of some of the convictions of the defendant, or because the circumstances of the case require it. Likewise, if sentencing is not presumptively de novo, new issues may be raised at resentencing if there is "good cause" for new objections under Fed. R. Crim. P. 32. *See, e.g., United States v. McCoy (en banc),* 313 F. 3d 561 (D.C. Cir. 2002).

Application of the majority "law of the case" rule to second sentencing appeals will not completely prohibit new issues from being raised in second appeals under Fed. R. Crim. P. 52, where there is plain error affecting substantial rights. An exception to the law of the case doctrine is recognized by all courts that apply it where: (1) the evidence is substantially changed, (2) controlling authority has changed or (3) the decision was clearly erroneous and would work a manifest injustice. *See, e.g., United States v. Becerra,* 155 F. 3d 740, 752-753, (5th Cir. 1998).

CONCLUSION

For the foregoing reasons, as well as the reasons expressed in the petition, this Petition for Writ of Certiorari should be granted.

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